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California Motor Transport Co. v. Trucking Unlimited (1972), pp. 679-689
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# BARKER *v.* WINGO, WARDEN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 71-5255. Argued April 11, 1972—Decided June 22, 1972

Petitioner was not brought to trial for murder until more than five years after he had been arrested, during which time the prosecution obtained numerous continuances, initially for the purpose of first trying petitioner's alleged accomplice so that his testimony, if conviction resulted, would be available at petitioner's trial. Before the accomplice was finally convicted, he was tried six times. Petitioner made no objection to the continuances until three and one-half years after he was arrested. After the accomplice was finally convicted, petitioner, after further delays because of a key prosecution witness' illness, was tried and convicted. In this habeas corpus proceeding the Court of Appeals, concluding that petitioner had waived his right to a speedy trial for the period prior to his demand for trial, and in any event had not been prejudiced by the delay, affirmed the District Court's judgment against petitioner. *Held:* A defendant's constitutional right to a speedy trial cannot be established by any inflexible rule but can be determined only on an *ad hoc* balancing basis, in which the conduct of the prosecution and that of the defendant are weighed. The court should assess such factors as the length of and reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. In this case the lack of any serious prejudice to petitioner and the fact, as disclosed by the record, that he did not want a speedy trial outweigh opposing considerations and compel the conclusion that petitioner was not deprived of his due process right to a speedy trial. Pp. 519–536.

442 F. 2d 1141, affirmed.

POWELL, J., delivered the opinion for a unanimous Court. WHITE, J., filed a concurring opinion, in which BRENNAN, J., joined, *post*, p. 536.

*James E. Milliman* argued the cause for petitioner *pro hac vice*. With him on the brief were *Norvie L. Lay* and *J. Chester Porter*.

*Robert W. Willmott, Jr.*, Assistant Attorney General of Kentucky, argued the cause for respondent *pro hac vice*. With him on the brief was *Ed W. Hancock*, Attorney General.

Briefs of *amici curiae* were filed by *Solicitor General Griswold* for the United States, and by *Thomas D. Barr* for the Lawyers Committee for Civil Rights Under Law.

MR. JUSTICE POWELL delivered the opinion of the Court.

Although a speedy trial is guaranteed the accused by the Sixth Amendment to the Constitution,[1] this Court has dealt with that right on infrequent occasions. See *Beavers* v. *Haubert*, 198 U. S. 77 (1905); *Pollard* v. *United States*, 352 U. S. 354 (1957); *United States* v. *Ewell*, 383 U. S. 116 (1966); *United States* v. *Marion*, 404 U. S. 307 (1971). See also *United States* v. *Provoo*, 17 F. R. D. 183 (D. Md.), aff'd, 350 U. S. 857 (1955). The Court's opinion in *Klopfer* v. *North Carolina*, 386 U. S. 213 (1967), established that the right to a speedy trial is "fundamental" and is imposed by the Due Process Clause of the Fourteenth Amendment on the States.[2] See *Smith* v. *Hooey*, 393 U. S. 374 (1969); *Dickey* v. *Florida*, 398 U. S. 30 (1970). As MR. JUSTICE BRENNAN

[1] The Sixth Amendment provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

[2] "We hold here that the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment." 386 U. S., at 223.

pointed out in his concurring opinion in *Dickey,* in none of these cases have we attempted to set out the criteria by which the speedy trial right is to be judged. 398 U. S., at 40–41. This case compels us to make such an attempt.

I

On July 20, 1958, in Christian County, Kentucky, an elderly couple was beaten to death by intruders wielding an iron tire tool. Two suspects, Silas Manning and Willie Barker, the petitioner, were arrested shortly thereafter. The grand jury indicted them on September 15. Counsel was appointed on September 17, and Barker's trial was set for October 21. The Commonwealth had a stronger case against Manning, and it believed that Barker could not be convicted unless Manning testified against him. Manning was naturally unwilling to incriminate himself. Accordingly, on October 23, the day Silas Manning was brought to trial, the Commonwealth sought and obtained the first of what was to be a series of 16 continuances of Barker's trial.[3] Barker made no objection. By first convicting Manning, the Commonwealth would remove possible problems of self-incrimination and would be able to assure his testimony against Barker.

The Commonwealth encountered more than a few difficulties in its prosecution of Manning. The first trial ended in a hung jury. A second trial resulted in a conviction, but the Kentucky Court of Appeals reversed because of the admission of evidence obtained by an illegal search. *Manning* v. *Commonwealth,* 328 S. W. 2d 421 (1959). At his third trial, Manning was again convicted, and the Court of Appeals again reversed

[3] There is no explanation in the record why, although Barker's initial trial was set for October 21, no continuance was sought until October 23, two days after the trial should have begun.

because the trial court had not granted a change of venue. *Manning* v. *Commonwealth*, 346 S. W. 2d 755 (1961). A fourth trial resulted in a hung jury. Finally, after five trials, Manning was convicted, in March 1962, of murdering one victim, and after a sixth trial, in December 1962, he was convicted of murdering the other.[4]

The Christian County Circuit Court holds three terms each year—in February, June, and September. Barker's initial trial was to take place in the September term of 1958. The first continuance postponed it until the February 1959 term. The second continuance was granted for one month only. Every term thereafter for as long as the Manning prosecutions were in process, the Commonwealth routinely moved to continue Barker's case to the next term. When the case was continued from the June 1959 term until the following September, Barker, having spent 10 months in jail, obtained his release by posting a $5,000 bond. He thereafter remained free in the community until his trial. Barker made no objection, through his counsel, to the first 11 continuances.

When on February 12, 1962, the Commonwealth moved for the twelfth time to continue the case until the following term, Barker's counsel filed a motion to dismiss the indictment. The motion to dismiss was denied two weeks later, and the Commonwealth's motion for a continuance was granted. The Commonwealth was granted further continuances in June 1962 and September 1962, to which Barker did not object.

In February 1963, the first term of court following Manning's final conviction, the Commonwealth moved to set Barker's trial for March 19. But on the day scheduled for trial, it again moved for a continuance until the June term. It gave as its reason the illness

[4] Apparently Manning chose not to appeal these final two convictions.

of the ex-sheriff who was the chief investigating officer in the case. To this continuance, Barker objected unsuccessfully.

The witness was still unable to testify in June, and the trial, which had been set for June 19, was continued again until the September term over Barker's objection. This time the court announced that the case would be dismissed for lack of prosecution if it were not tried during the next term. The final trial date was set for October 9, 1963. On that date, Barker again moved to dismiss the indictment, and this time specified that his right to a speedy trial had been violated.[5] The motion was denied; the trial commenced with Manning as the chief prosecution witness; Barker was convicted and given a life sentence.

Barker appealed his conviction to the Kentucky Court of Appeals, relying in part on his speedy trial claim. The court affirmed. *Barker* v. *Commonwealth,* 385 S. W. 2d 671 (1964). In February 1970 Barker petitioned for habeas corpus in the United States District Court for the Western District of Kentucky. Although the District Court rejected the petition without holding a hearing, the court granted petitioner leave to appeal *in forma pauperis* and a certificate of probable cause to appeal. On appeal, the Court of Appeals for the Sixth Circuit affirmed the District Court. 442 F. 2d 1141 (1971). It ruled that Barker had waived his speedy trial claim for the entire period before February 1963, the date on which the court believed he had first objected to the delay by filing a motion to dismiss. In this belief the court was mistaken, for the record re-

[5] The written motion Barker filed alleged that he had objected to every continuance since February 1959. The record does not reflect any objections until the motion to dismiss, filed in February 1962, and the objections to the continuances sought by the Commonwealth in March 1963 and June 1963.

veals that the motion was filed in February 1962. The Commonwealth so conceded at oral argument before this Court.[6] The court held further that the remaining period after the date on which Barker first raised his claim and before his trial—which it thought was only eight months but which was actually 20 months—was not unduly long. In addition, the court held that Barker had shown no resulting prejudice, and that the illness of the ex-sheriff was a valid justification for the delay. We granted Barker's petition for certiorari. 404 U. S. 1037 (1972).

## II

The right to a speedy trial is generically different from any of the other rights enshrined in the Constitution for the protection of the accused. In addition to the general concern that all accused persons be treated according to decent and fair procedures, there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused. The inability of courts to provide a prompt trial has contributed to a large backlog of cases in urban courts which, among other things, enables defendants to negotiate more effectively for pleas of guilty to lesser offenses and otherwise manipulate the system.[7] In addition, persons released on bond for lengthy periods awaiting trial have an opportunity to commit other crimes.[8] It must be of little comfort to the residents of Christian County, Kentucky, to know that Barker was at large on bail for over four years while accused of a vicious

[6] Tr. of Oral Arg. 33.

[7] Report of the President's Commission on Crime in the District of Columbia 256 (1966).

[8] In Washington, D. C., in 1968, 70.1% of the persons arrested for robbery and released prior to trial were re-arrested while on bail. Mitchell, Bail Reform and the Constitutionality of Pretrial Deten-

and brutal murder of which he was ultimately convicted. Moreover, the longer an accused is free awaiting trial, the more tempting becomes his opportunity to jump bail and escape.[9] Finally, delay between arrest and punishment may have a detrimental effect on rehabilitation.[10]

If an accused cannot make bail, he is generally confined, as was Barker for 10 months, in a local jail. This contributes to the overcrowding and generally deplorable state of those institutions.[11] Lengthy exposure to these conditions "has a destructive effect on human character and makes the rehabilitation of the individual offender much more difficult." [12] At times the result may even be violent rioting.[13] Finally, lengthy pretrial detention is costly. The cost of maintaining a prisoner in jail varies from $3 to $9 per day, and this amounts to millions across

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tion, 55 Va. L. Rev. 1223, 1236 (1969), citing Report of the Judicial Council Committee to Study the Operation of the Bail Reform Act in the District of Columbia 20–21 (1969).

[9] The number of these offenses has been increasing. See Annual Report of the Director of the Administrative Office of the United States Courts, 1971, p. 321.

[10] "[I]t is desirable that punishment should follow offence as closely as possible; for its impression upon the minds of men is weakened by distance, and, besides, distance adds to the uncertainty of punishment, by affording new chances of escape." J. Bentham, The Theory of Legislation 326 (Ogden ed. 1931).

[11] To Establish Justice, To Insure Domestic Tranquility, Final Report of the National Commission on the Causes and Prevention of Violence 152 (1969).

[12] Testimony of James V. Bennett, Director, Bureau of Prisons, Hearings on Federal Bail Procedures before the Subcommittee on Constitutional Rights and the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 88th Cong., 2d Sess., 46 (1964).

[13] *E. g.*, the "Tombs" riots in New York City in 1970. N. Y. Times, Oct. 3, 1970, p. 1, col. 8.

the Nation.[14] In addition, society loses wages which might have been earned, and it must often support families of incarcerated breadwinners.

A second difference between the right to speedy trial and the accused's other constitutional rights is that deprivation of the right may work to the accused's advantage. Delay is not an uncommon defense tactic. As the time between the commission of the crime and trial lengthens, witnesses may become unavailable or their memories may fade. If the witnesses support the prosecution, its case will be weakened, sometimes seriously so. And it is the prosecution which carries the burden of proof. Thus, unlike the right to counsel or the right to be free from compelled self-incrimination, deprivation of the right to speedy trial does not *per se* prejudice the accused's ability to defend himself.

Finally, and perhaps most importantly, the right to speedy trial is a more vague concept than other procedural rights. It is, for example, impossible to determine with precision when the right has been denied. We cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate.[15] As a consequence, there is no fixed point in the criminal process when the State can put the defendant to the choice of either exercising or waiving the right to a speedy trial. If, for example, the State moves for

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[14] The Challenge of Crime in a Free Society, A Report by the President's Commission on Law Enforcement and Administration of Justice 131 (1967).

[15] "[I]n large measure because of the many procedural safeguards provided an accused, the ordinary procedures for criminal prosecution are designed to move at a deliberate pace. A requirement of unreasonable speed would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself." *United States* v. *Ewell,* 383 U. S. 116, 120 (1966).

a 60-day continuance, granting that continuance is not a violation of the right to speedy trial unless the circumstances of the case are such that further delay would endanger the values the right protects. It is impossible to do more than generalize about when those circumstances exist. There is nothing comparable to the point in the process when a defendant exercises or waives his right to counsel or his right to a jury trial. Thus, as we recognized in *Beavers* v. *Haubert, supra,* any inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case:

> "The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice." 198 U. S., at 87.

The amorphous quality of the right also leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived. This is indeed a serious consequence because it means that a defendant who may be guilty of a serious crime will go free, without having been tried. Such a remedy is more serious than an exclusionary rule or a reversal for a new trial,[16] but it is the only possible remedy.

## III

Perhaps because the speedy trial right is so slippery, two rigid approaches are urged upon us as ways of eliminating some of the uncertainty which courts ex-

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[16] MR. JUSTICE WHITE noted in his opinion for the Court in *Ewell, supra,* at 121, that overzealous application of this remedy would infringe "the societal interest in trying people accused of crime, rather than granting them immunization because of legal error. . . ."

perience in protecting the right. The first suggestion is that we hold that the Constitution requires a criminal defendant to be offered a trial within a specified time period. The result of such a ruling would have the virtue of clarifying when the right is infringed and of simplifying courts' application of it. Recognizing this, some legislatures have enacted laws, and some courts have adopted procedural rules which more narrowly define the right.[17] The United States Court of Appeals for the Second Circuit has promulgated rules for the district courts in that Circuit establishing that the government must be ready for trial within six months of the date of arrest, except in unusual circumstances, or the charge will be dismissed.[18] This type of rule is also recommended by the American Bar Association.[19]

But such a result would require this Court to engage in legislative or rulemaking activity, rather than in the adjudicative process to which we should confine our efforts. We do not establish procedural rules for the States, except when mandated by the Constitution. We find no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months. The States, of course, are free to prescribe a reasonable period consistent with constitutional standards, but our approach must be less precise.

The second suggested alternative would restrict con-

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[17] For examples, see American Bar Association Project on Standards for Criminal Justice, Speedy Trial 14–16 (Approved Draft 1968); Note, The Right to a Speedy Criminal Trial, 57 Col. L. Rev. 846, 863 (1957).

[18] Second Circuit Rules Regarding Prompt Disposition of Criminal Cases (1971).

[19] ABA Project, *supra*, n. 17, at 14. For an example of a proposed statutory rule, see Note, The Lagging Right to a Speedy Trial, 51 Va. L. Rev. 1587, 1619 (1965).

sideration of the right to those cases in which the accused has demanded a speedy trial. Most States have recognized what is loosely referred to as the "demand rule," [20] although eight States reject it.[21] It is not clear, however, precisely what is meant by that term. Although every federal court of appeals that has considered the question has endorsed some kind of demand rule, some have regarded the rule within the concept of waiver,[22] whereas others have viewed it as a factor to be weighed

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[20] *E. g., Pines* v. *District Court of Woodbury County,* 233 Iowa 1284, 10 N. W. 2d 574 (1943). See generally Note, The Right to a Speedy Criminal Trial, 57 Col. L. Rev. 846, 853 (1957); Note, The Lagging Right to a Speedy Trial, 51 Va. L. Rev. 1587, 1601–1602 (1965).

[21] See *State* v. *Maldonado,* 92 Ariz. 70, 373 P. 2d 583 (*en banc*), cert. denied, 371 U. S. 928 (1962); *Hicks* v. *People,* 148 Colo. 26, 364 P. 2d 877 (1961) (*en banc*); *People* v. *Prosser,* 309 N. Y. 353, 130 N. E. 2d 891 (1955); *Zehrlaut* v. *State,* 230 Ind. 175, 102 N. E. 2d 203 (1951); *Flanary* v. *Commonwealth,* 184 Va. 204, 35 S. E. 2d 135 (1945); *Ex parte Chalfant,* 81 W. Va. 93, 93 S. E. 1032 (1917); *State* v. *Hess,* 180 Kan. 472, 304 P. 2d 474 (1956); *State* v. *Dodson,* 226 Ore. 458, 360 P. 2d 782 (1961). But see *State* v. *Vawter,* 236 Ore. 85, 386 P. 2d 915 (1963).

[22] See *United States* v. *Hill,* 310 F. 2d 601 (CA4 1962); *Bruce* v. *United States,* 351 F. 2d 318 (CA5 1965), cert. denied, 384 U. S. 921 (1966); *United States* v. *Perez,* 398 F. 2d 658 (CA7 1968), cert. denied, 393 U. S. 1080 (1969); *Pietch* v. *United States,* 110 F. 2d 817 (CA10), cert. denied, 310 U. S. 648 (1940); *Smith* v. *United States,* 118 U. S. App. D. C. 38, 331 F. 2d 784 (1964) (*en banc*). The opinion below in this case demonstrates that the Sixth Circuit takes a similar approach.

As an indication of the importance which these courts have attached to the demand rule, see *Perez, supra,* in which the court held that a defendant waived any speedy trial claim, because he knew of an indictment and made no demand for an immediate trial, even though the record gave no indication that he was represented by counsel at the time when he should have made his demand, and even though he was not informed by the court or the prosecution of his right to a speedy trial.

in assessing whether there has been a deprivation of the speedy trial right.[23] We shall refer to the former approach as the demand-waiver doctrine. The demand-waiver doctrine provides that a defendant waives any consideration of his right to speedy trial for any period prior to which he has not demanded a trial. Under this rigid approach, a prior demand is a necessary condition to the consideration of the speedy trial right. This essentially was the approach the Sixth Circuit took below.

Such an approach, by presuming waiver of a fundamental right[24] from inaction, is inconsistent with this Court's pronouncements on waiver of constitutional rights. The Court has defined waiver as "an intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst,* 304 U. S. 458, 464 (1938). Courts should "indulge every reasonable presumption against waiver," *Aetna Ins. Co.* v. *Kennedy,* 301 U. S. 389, 393 (1937), and they should "not presume acqui-

[23] Although stating that they recognize a demand rule, the approach of the Eighth and Ninth Circuits seems to be that a denial of speedy trial can be found despite an absence of a demand under some circumstances. See *Bandy* v. *United States,* 408 F. 2d 518 (CA8 1969) (a purposeful or oppressive delay may overcome a failure to demand); *Moser* v. *United States,* 381 F. 2d 363 (CA9 1967) (despite a failure to demand, the court balanced other considerations).

The Second Circuit's approach is unclear. There are cases in which a failure to demand is strictly construed as a waiver. *E. g., United States* v. *DeMasi,* 445 F. 2d 251 (1971). In other cases, the court has seemed to be willing to consider claims in which there was no demand. *E. g., United States ex rel. Solomon* v. *Mancusi,* 412 F. 2d 88, cert. denied, 396 U. S. 936 (1969). Certainly the District Courts in the Second Circuit have not regarded the demand rule as being rigid. See *United States* v. *Mann,* 291 F. Supp. 268 (SDNY 1968); *United States* v. *Dillon,* 183 F. Supp. 541 (SDNY 1960).

The First Circuit also seems to reject the more rigid approach. Compare *United States* v. *Butler,* 426 F. 2d 1275 (1970), with *Needel* v. *Scafati,* 412 F. 2d 761, cert. denied, 396 U. S. 861 (1969).

[24] See n. 2, *supra.*

escence in the loss of fundamental rights," *Ohio Bell Tel. Co.* v. *Public Utilities Comm'n,* 301 U. S. 292, 307 (1937). In *Carnley* v. *Cochran,* 369 U. S. 506 (1962), we held:

> "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandably rejected the offer. Anything less is not waiver." *Id.,* at 516.

The Court has ruled similarly with respect to waiver of other rights designed to protect the accused. See, *e. g., Miranda* v. *Arizona,* 384 U. S. 436, 475–476 (1966); *Boykin* v. *Alabama,* 395 U. S. 238 (1969).

In excepting the right to speedy trial from the rule of waiver we have applied to other fundamental rights, courts that have applied the demand-waiver rule have relied on the assumption that delay usually works for the benefit of the accused and on the absence of any readily ascertainable time in the criminal process for a defendant to be given the choice of exercising or waiving his right. But it is not necessarily true that delay benefits the defendant. There are cases in which delay appreciably harms the defendant's ability to defend himself.[25]

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[25] "If a defendant deliberately by-passes state procedure for some strategic, tactical, or other reason, a federal judge on habeas corpus may deny relief if he finds that the by-passing was the *considered* choice of the petitioner. The demand doctrine presupposes that failure to demand trial is a deliberate choice for supposed advantage on the assumption that delay always benefits the accused, but the delay does not inherently benefit the accused any more than it does the state. Consequently, a man should not be presumed to have exercised a deliberate choice because of silence or inaction that could equally mean that he is unaware of the necessity for a demand." Note, The Lagging Right to a Speedy Trial, 51 Va. L. Rev. 1587, 1610 (1965) (footnotes omitted).

Moreover, a defendant confined to jail prior to trial is obviously disadvantaged by delay as is a defendant released on bail but unable to lead a normal life because of community suspicion and his own anxiety.

The nature of the speedy trial right does make it impossible to pinpoint a precise time in the process when the right must be asserted or waived, but that fact does not argue for placing the burden of protecting the right solely on defendants. A defendant has no duty to bring himself to trial; [26] the State has that duty as well as the duty of insuring that the trial is consistent with due process.[27] Moreover, for the reasons earlier expressed, society has a particular interest in bringing swift prosecutions, and society's representatives are the ones who should protect that interest.

It is also noteworthy that such a rigid view of the demand-waiver rule places defense counsel in an awkward position. Unless he demands a trial early and often, he is in danger of frustrating his client's right. If counsel is willing to tolerate some delay because he finds it reasonable and helpful in preparing his own case, he may be unable to obtain a speedy trial for his client at the end of that time. Since under the demand-waiver rule no time

[26] As Mr. Chief Justice Burger wrote for the Court in *Dickey* v. *Florida:*

"Although a great many accused persons seek to put off the confrontation as long as possible, the right to a prompt inquiry into criminal charges is fundamental and the duty of the charging authority is to provide a prompt trial." 398 U. S. 30, 37–38 (1970) (footnote omitted).

[27] As a circuit judge, Mr. Justice Blackmun wrote:

"The government and, for that matter, the trial court are not without responsibility for the expeditious trial of criminal cases. The burden for trial promptness is not solely upon the defense. The right to 'a speedy . . . trial' is constitutionally guaranteed and, as such, is not to be honored only for the vigilant and the knowledgeable." *Hodges* v. *United States,* 408 F. 2d 543, 551 (CA8 1969).

runs until the demand is made, the government will have whatever time is otherwise reasonable to bring the defendant to trial after a demand has been made. Thus, if the first demand is made three months after arrest in a jurisdiction which prescribes a six-month rule, the prosecution will have a total of nine months—which may be wholly unreasonable under the circumstances. The result in practice is likely to be either an automatic, *pro forma* demand made immediately after appointment of counsel or delays which, but for the demand-waiver rule, would not be tolerated. Such a result is not consistent with the interests of defendants, society, or the Constitution.

We reject, therefore, the rule that a defendant who fails to demand a speedy trial forever waives his right.[28] This does not mean, however, that the defendant has no responsibility to assert his right. We think the better rule is that the defendant's assertion of or failure to assert his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of the right. Such a formulation avoids the rigidities of the demand-waiver rule and the resulting possible unfairness in its application. It allows the trial court

[28] The American Bar Association also rejects the rigid demand-waiver rule:

"One reason for this position is that there are a number of situations, such as where the defendant is unaware of the charge or where the defendant is without counsel, in which it is unfair to require a demand . . . . Jurisdictions with a demand requirement are faced with the continuing problem of defining exceptions, a process which has not always been carried out with uniformity . . . . More important, the demand requirement is inconsistent with the public interest in prompt disposition of criminal cases. . . . [T]he trial of a criminal case should not be unreasonably delayed merely because the defendant does not think that it is in his best interest to seek prompt disposition of the charge." ABA Project, *supra*, n. 17, at 17.

to exercise a judicial discretion based on the circumstances, including due consideration of any applicable formal procedural rule. It would permit, for example, a court to attach a different weight to a situation in which the defendant knowingly fails to object from a situation in which his attorney acquiesces in long delay without adequately informing his client, or from a situation in which no counsel is appointed. It would also allow a court to weigh the frequency and force of the objections as opposed to attaching significant weight to a purely *pro forma* objection.

In ruling that a defendant has some responsibility to assert a speedy trial claim, we do not depart from our holdings in other cases concerning the waiver of fundamental rights, in which we have placed the entire responsibility on the prosecution to show that the claimed waiver was knowingly and voluntarily made. Such cases have involved rights which must be exercised or waived at a specific time or under clearly identifiable circumstances, such as the rights to plead not guilty, to demand a jury trial, to exercise the privilege against self-incrimination, and to have the assistance of counsel. We have shown above that the right to a speedy trial is unique in its uncertainty as to when and under what circumstances it must be asserted or may be deemed waived. But the rule we announce today, which comports with constitutional principles, places the primary burden on the courts and the prosecutors to assure that cases are brought to trial. We hardly need add that if delay is attributable to the defendant, then his waiver may be given effect under standard waiver doctrine, the demand rule aside.

We, therefore, reject both of the inflexible approaches—the fixed-time period because it goes further than the Constitution requires; the demand-waiver rule because it is insensitive to a right which we have deemed

fundamental. The approach we accept is a balancing test, in which the conduct of both the prosecution and the defendant are weighed.[29]

## IV

A balancing test necessarily compels courts to approach speedy trial cases on an *ad hoc* basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.[30]

The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. Nevertheless, because of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the pecu-

[29] Nothing we have said should be interpreted as disapproving a presumptive rule adopted by a court in the exercise of its supervisory powers which establishes a fixed time period within which cases must normally be brought. See n. 18, *supra*.

[30] See, *e. g.*, *United States* v. *Simmons*, 338 F. 2d 804, 807 (CA2 1964), cert. denied, 380 U. S. 983 (1965); Note, The Right to a Speedy Trial, 20 Stan. L. Rev. 476, 478 n. 15 (1968).

In his concurring opinion in *Dickey*, MR. JUSTICE BRENNAN identified three factors for consideration: the source of the delay, the reasons for it, and whether the delay prejudiced the interests protected by the right. 398 U. S., at 48. He included consideration of the defendant's failure to assert his right in the cause-of-delay category, and he thought the length of delay was relevant primarily to the reasons for delay and its prejudicial effects. *Id.*, n. 12. In essence, however, there is little difference between his approach and the one we adopt today. See also Note, The Right to a Speedy Trial, *supra*, for another slightly different approach.

liar circumstances of the case.[31] To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.

Closely related to length of delay is the reason the government assigns to justify the delay. Here, too, different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government.[32] A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

We have already discussed the third factor, the defendant's responsibility to assert his right. Whether and how a defendant asserts his right is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in de-

[31] For example, the First Circuit thought a delay of nine months overly long, absent a good reason, in a case that depended on eyewitness testimony. *United States* v. *Butler*, 426 F. 2d 1275, 1277 (1970).

[32] We have indicated on previous occasions that it is improper for the prosecution intentionally to delay "to gain some tactical advantage over [defendants] or to harass them." *United States* v. *Marion*, 404 U. S. 307, 325 (1971). See *Pollard* v. *United States*, 352 U. S. 354, 361 (1957).

termining whether the defendant is being deprived of the right. We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.

A fourth factor is prejudice to the defendant. Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired.[33] Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown.

We have discussed previously the societal disadvantages of lengthy pretrial incarceration, but obviously the disadvantages for the accused who cannot obtain his release are even more serious. The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs.[34] The time spent in

[33] *United States* v. *Ewell*, 383 U. S., at 120; *Smith* v. *Hooey*, 393 U. S. 374, 377–378 (1969). In *Klopfer* v. *North Carolina*, 386 U. S. 213, 221–222 (1967), we indicated that a defendant awaiting trial on bond might be subjected to public scorn, deprived of employment, and chilled in the exercise of his right to speak for, associate with, and participate in unpopular political causes.

[34] See To Establish Justice, To Insure Domestic Tranquility, Final Report of the National Commission on the Causes and Prevention of Violence 152 (1969).

jail is simply dead time. Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense.[35] Imposing those consequences on anyone who has not yet been convicted is serious. It is especially unfortunate to impose them on those persons who are ultimately found to be innocent. Finally, even if an accused is not incarcerated prior to trial, he is still disadvantaged by restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility. See cases cited in n. 33, *supra.*

We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process.[36] But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution.

## V

The difficulty of the task of balancing these factors is illustrated by this case, which we consider to be close. It is clear that the length of delay between arrest and trial—well over five years—was extraordinary. Only

[35] There is statistical evidence that persons who are detained between arrest and trial are more likely to receive prison sentences than those who obtain pretrial release, although other factors bear upon this correlation. See Wald, Pretrial Detention and Ultimate Freedom: A Statistical Study, 39 N. Y. U. L. Rev. 631 (1964).

[36] For an example of how the speedy trial issue should be approached, see Judge Frankel's excellent opinion in *United States* v. *Mann,* 291 F. Supp. 268 (SDNY 1968).

seven months of that period can be attributed to a strong excuse, the illness of the ex-sheriff who was in charge of the investigation. Perhaps some delay would have been permissible under ordinary circumstances, so that Manning could be utilized as a witness in Barker's trial, but more than four years was too long a period, particularly since a good part of that period was attributable to the Commonwealth's failure or inability to try Manning under circumstances that comported with due process.

Two counterbalancing factors, however, outweigh these deficiencies. The first is that prejudice was minimal. Of course, Barker was prejudiced to some extent by living for over four years under a cloud of suspicion and anxiety. Moreover, although he was released on bond for most of the period, he did spend 10 months in jail before trial. But there is no claim that any of Barker's witnesses died or otherwise became unavailable owing to the delay. The trial transcript indicates only two very minor lapses of memory—one on the part of a prosecution witness—which were in no way significant to the outcome.

More important than the absence of serious prejudice, is the fact that Barker did not want a speedy trial. Counsel was appointed for Barker immediately after his indictment and represented him throughout the period. No question is raised as to the competency of such counsel.[37] Despite the fact that counsel had notice of the motions for continuances,[38] the record shows no action whatever taken between October 21, 1958, and February 12, 1962, that could be construed as the assertion of the speedy trial right. On the latter date, in response to another motion for continuance, Barker moved

[37] Tr. of Oral Arg. 39.

[38] *Id.*, at 4.

to dismiss the indictment. The record does not show on what ground this motion was based, although it is clear that no alternative motion was made for an immediate trial. Instead the record strongly suggests that while he hoped to take advantage of the delay in which he had acquiesced and thereby obtain a dismissal of the charges, he definitely did not want to be tried. Counsel conceded as much at oral argument:

> "Your honor, I would concede that Willie Mae Barker probably—I don't know this for a fact—probably did not want to be tried. I don't think any man wants to be tried. And I don't consider this a liability on his behalf. I don't blame him." Tr. of Oral Arg. 39.

The probable reason for Barker's attitude was that he was gambling on Manning's acquittal. The evidence was not very strong against Manning, as the reversals and hung juries suggest, and Barker undoubtedly thought that if Manning were acquitted, he would never be tried. Counsel also conceded this:

> "Now, it's true that the reason for this delay was the Commonwealth of Kentucky's desire to secure the testimony of the accomplice, Silas Manning. And it's true that if Silas Manning were never convicted, Willie Mae Barker would never have been convicted. We concede this." *Id.*, at 15.[39]

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[39] Hindsight is, of course, 20/20, but we cannot help noting that if Barker had moved immediately and persistently for a speedy trial following indictment, and if he had been successful, he would have undoubtedly been acquitted since Manning's testimony was crucial to the Commonwealth's case. It could not have been anticipated at the outset, however, that Manning would have been tried six times over a four-year period. Thus, the decision to gamble on Manning's acquittal may have been a prudent choice at the time it was made.

That Barker was gambling on Manning's acquittal is also suggested by his failure, following the *pro forma* motion to dismiss filed in February 1962, to object to the Commonwealth's next two motions for continuances. Indeed, it was not until March 1963, after Manning's convictions were final, that Barker, having lost his gamble, began to object to further continuances. At that time, the Commonwealth's excuse was the illness of the ex-sheriff, which Barker has conceded justified the further delay.[40]

We do not hold that there may never be a situation in which an indictment may be dismissed on speedy trial grounds where the defendant has failed to object to continuances. There may be a situation in which the defendant was represented by incompetent counsel, was severely prejudiced, or even cases in which the continuances were granted *ex parte*. But barring extraordinary circumstances, we would be reluctant indeed to rule that a defendant was denied this constitutional right on a record that strongly indicates, as does this one, that the defendant did not want a speedy trial. We hold, therefore, that Barker was not deprived of his due process right to a speedy trial.

The judgment of the Court of Appeals is

*Affirmed.*

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN joins, concurring.

Although the Court rejects petitioner's speedy trial claim and affirms denial of his petition for habeas corpus,

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[40] At oral argument, counsel for Barker stated:

"That was after the sheriff, the material witness, was ill; the man who had arrested the petitioner, yes. And the Sixth Circuit held that this was a sufficient reason for delay, and we don't deny this. We concede that this was sufficient for the delay from March 1963 to October, but it does not explain the delays prior to that." Tr. of Oral Arg. 19–20.

it is apparent that had Barker not so clearly acquiesced in the major delays involved in this case, the result would have been otherwise. From the Commonwealth's point of view, it is fortunate that the case was set for early trial and that postponements took place only upon formal requests to which Barker had opportunity to object.

Because the Court broadly assays the factors going into constitutional judgments under the speedy trial provision, it is appropriate to emphasize that one of the major purposes of the provision is to guard against inordinate delay between public charge and trial, which, wholly aside from possible prejudice to a defense on the merits, may "seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends." *United States* v. *Marion,* 404 U. S. 307, 320 (1971). These factors are more serious for some than for others, but they are inevitably present in every case to some extent, for every defendant will either be incarcerated pending trial or on bail subject to substantial restrictions on his liberty. It is also true that many defendants will believe that time is on their side and will prefer to suffer whatever disadvantages delay may entail. But, for those who desire an early trial, these personal factors should prevail if the only countervailing considerations offered by the State are those connected with crowded dockets and prosecutorial case loads. A defendant desiring a speedy trial, therefore, should have it within some reasonable time; and only special circumstances presenting a more pressing public need with respect to the case itself should suffice to justify delay. Only if such special considerations are in the case and if they outweigh the inevitable personal prejudice resulting from delay would

it be necessary to consider whether there has been or would be prejudice to the defense at trial. "[T]he major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense." *United States* v. *Marion, supra,* at 320.

Of course, cases will differ among themselves as to the allowable time between charge and trial so as to permit prosecution and defense adequately to prepare their case. But unreasonable delay in run-of-the-mill criminal cases cannot be justified by simply asserting that the public resources provided by the State's criminal-justice system are limited and that each case must await its turn. As the Court points out, this approach also subverts the State's own goals in seeking to enforce its criminal laws.

# BELL, ATTORNEY GENERAL, ET AL. *v.* WOLFISH ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 77–1829. Argued January 16, 1979—Decided May 14, 1979

Respondent inmates brought this class action in Federal District Court challenging the constitutionality of numerous conditions of confinement and practices in the Metropolitan Correctional Center (MCC), a federally operated short-term custodial facility in New York City designed primarily to house pretrial detainees. The District Court, on various constitutional grounds, enjoined, *inter alia,* the practice of housing, primarily for sleeping purposes, two inmates in individual rooms originally intended for single occupancy ("double-bunking"); enforcement of the so-called "publisher-only" rule prohibiting inmates from receiving hard-cover books that are not mailed directly from publishers, book clubs, or bookstores; the prohibition against inmates' receipt of packages of food and personal items from outside the institution; the practice of body-cavity searches of inmates following contact visits with persons from outside the institution; and the requirement that pretrial detainees remain outside their rooms during routine inspections by MCC officials. The Court of Appeals affirmed these rulings, holding with respect to the "double-bunking" practice that the MCC had failed to make a showing of "compelling necessity" sufficient to justify such practice.

*Held:*

1. The "double-bunking" practice does not deprive pretrial detainees of their liberty without due process of law in contravention of the Fifth Amendment. Pp. 530–543.

(a) There is no source in the Constitution for the Court of Appeals' compelling-necessity standard. Neither the presumption of innocence, the Due Process Clause of the Fifth Amendment, nor a pretrial detainee's right to be free from punishment provides any basis for such standard. Pp. 531–535.

(b) In evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law, the proper inquiry is whether those conditions or restrictions amount to punishment of the detainee. Absent a showing of an expressed intent to punish, if a particular condition or restriction is reasonably related to a legitimate nonpunitive governmental objective, it does not, without more, amount to "punishment," but, conversely, if a condition or restriction is arbitrary or pur-

poseless, a court may permissibly infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees. In addition to ensuring the detainees' presence at trial, the effective management of the detention facility once the individual is confined is a valid objective that may justify imposition of conditions and restrictions of pretrial detention and dispel any inference that such conditions and restrictions are intended as punishment. Pp. 535–540.

(c) Judged by the above analysis and on the record, "double-bunking" as practiced at the MCC did not, as a matter of law, amount to punishment and hence did not violate respondents' rights under the Due Process Clause of the Fifth Amendment. While "double-bunking" may have taxed some of the equipment or particular facilities in certain of the common areas in the MCC, this does not mean that the conditions at the MCC failed to meet the standards required by the Constitution, particularly where it appears that nearly all pretrial detainees are released within 60 days. Pp. 541–543.

2. Nor do the "publisher-only" rule, body-cavity searches, the prohibition against the receipt of packages, or the room-search rule violate any constitutional guarantees. Pp. 544–562.

(a) Simply because prison inmates retain certain constitutional rights does not mean that these rights are not subject to restrictions and limitations. There must be a "mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application," *Wolff* v. *McDonnell*, 418 U. S. 539, 556, and this principle applies equally to pretrial detainees and convicted prisoners. Maintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees. Since problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions, prison administrators should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. Pp. 544–548.

(b) The "publisher-only" rule does not violate the First Amendment rights of MCC inmates but is a rational response by prison officials to the obvious security problem of preventing the smuggling of contraband in books sent from outside. Moreover, such rule operates in a neutral fashion, without regard to the content of the expression, there are alternative means of obtaining reading material, and the rule's impact on pretrial detainees is limited to a maximum period of approximately 60 days. Pp. 548–552.

(c) The restriction against the receipt of packages from outside the facility does not deprive pretrial detainees of their property without due process of law in contravention of the Fifth Amendment, especially in view of the obvious fact that such packages are handy devices for the smuggling of contraband. Pp. 553–555.

(d) Assuming that a pretrial detainee retains a diminished expectation of privacy after commitment to a custodial facility, the room-search rule does not violate the Fourth Amendment but simply facilitates the safe and effective performance of the searches and thus does not render the searches "unreasonable" within the meaning of that Amendment. Pp. 555–557.

(e) Similarly, assuming that pretrial detainees retain some Fourth Amendment rights upon commitment to a corrections facility, the body-cavity searches do not violate that Amendment. Balancing the significant and legitimate security interests of the institution against the inmates' privacy interests, such searches can be conducted on less than probable cause and are not unreasonable. Pp. 558–560.

(f) None of the security restrictions and practices described above constitute "punishment" in violation of the rights of pretrial detainees under the Due Process Clause of the Fifth Amendment. These restrictions and practices were reasonable responses by MCC officials to legitimate security concerns, and, in any event, were of only limited duration so far as the pretrial detainees were concerned. Pp. 560–562.

573 F. 2d 118, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, and BLACKMUN, JJ., joined. POWELL, J., filed an opinion concurring in part and dissenting in part, *post*, p. 563. MARSHALL, J., filed a dissenting opinion, *post*, p. 563. STEVENS, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 579.

*Deputy Solicitor General Frey* argued the cause for petitioners. With him on the briefs were *Solicitor General McCree, Assistant Attorney General Heymann, Kent L. Jones,* and *Sidney M. Glazer.*

*Phylis Skloot Bamberger* argued the cause for respondents. With her on the brief were *William E. Hellerstein, David J. Gottlieb,* and *Michael B. Mushlin.**

*Briefs of *amici curiae* urging affirmance were filed by *Jack Greenberg, James M. Nabrit III,* and *Joel Berger* for the NAACP Legal Defense and

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Over the past five Terms, this Court has in several decisions considered constitutional challenges to prison conditions or practices by convicted prisoners.[1] This case requires us to examine the constitutional rights of pretrial detainees—those persons who have been charged with a crime but who have not yet been tried on the charge. The parties concede that to ensure their presence at trial, these persons legitimately may be incarcerated by the Government prior to a determination of their guilt or innocence, *infra,* at 533–535, and n. 15; see 18 U. S. C. §§ 3146, 3148, and it is the scope of their rights during this period of confinement prior to trial that is the primary focus of this case.

This lawsuit was brought as a class action in the United States District Court for the Southern District of New York to challenge numerous conditions of confinement and practices at the Metropolitan Correctional Center (MCC), a federally operated short-term custodial facility in New York City designed primarily to house pretrial detainees. The District Court, in the words of the Court of Appeals for the Second Circuit, "intervened broadly into almost every facet of the institution" and enjoined no fewer than 20 MCC practices on constitutional and statutory grounds. The Court of Appeals largely affirmed the District Court's constitutional rulings and in the process held that under the Due Process Clause of the Fifth Amendment, pretrial detainees may "be subjected to only those 'restrictions and privations' which 'inhere in their confinement itself or which are justified by

Educational Fund, Inc., and by *Ralph I. Knowles, Jr.,* and *Alvin J. Bronstein* for the National Prison Project of the American Civil Liberties Union Foundation.

[1] See, *e. g., Hutto* v. *Finney,* 437 U. S. 678 (1978); *Jones* v. *North Carolina Prisoners' Labor Union,* 433 U. S. 119 (1977); *Bounds* v. *Smith,* 430 U. S. 817 (1977); *Meachum* v. *Fano,* 427 U. S. 215 (1976); *Wolff* v. *McDonnell,* 418 U. S. 539 (1974); *Pell* v. *Procunier,* 417 U. S. 817 (1974); *Procunier* v. *Martinez,* 416 U. S. 396 (1974).

compelling necessities of jail administration.'" *Wolfish* v. *Levi*, 573 F. 2d 118, 124 (1978), quoting *Rhem* v. *Malcolm*, 507 F. 2d 333, 336 (CA2 1974). We granted certiorari to consider the important constitutional questions raised by these decisions and to resolve an apparent conflict among the Circuits.[2] 439 U. S. 816 (1978). We now reverse.

## I

The MCC was constructed in 1975 to replace the converted waterfront garage on West Street that had served as New York City's federal jail since 1928. It is located adjacent to the Foley Square federal courthouse and has as its primary objective the housing of persons who are being detained in custody prior to trial for federal criminal offenses in the United States District Courts for the Southern and Eastern Districts of New York and for the District of New Jersey. Under the Bail Reform Act, 18 U. S. C. § 3146, a person in the federal system is committed to a detention facility only because no other less drastic means can reasonably ensure his presence at trial. In addition to pretrial detainees, the MCC also houses some convicted inmates who are awaiting sentencing or transportation to federal prison or who are serving generally relatively short sentences in a service capacity at the MCC, convicted prisoners who have been lodged at the facility under writs of habeas corpus *ad prosequendum* or *ad testificandum* issued to ensure their presence at upcoming trials, witnesses in protective custody, and persons incarcerated for contempt.[3]

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[2] See, *e. g.*, *Norris* v. *Frame*, 585 F. 2d 1183 (CA3 1978); *Campbell* v. *McGruder*, 188 U. S. App. D. C. 258, 580 F. 2d 521 (1978); *Wolfish* v. *Levi*, 573 F. 2d 118 (CA2 1978) (case below); *Feeley* v. *Sampson*, 570 F. 2d 364 (CA1 1978); *Main Road* v. *Aytch*, 565 F. 2d 54 (CA3 1977); *Patterson* v. *Morrisette*, 564 F. 2d 1109 (CA4 1977); *Miller* v. *Carson*, 563 F. 2d 741 (CA5 1977); *Duran* v. *Elrod*, 542 F. 2d 998 (CA7 1976).

[3] This group of nondetainees may comprise, on a daily basis, between 40% and 60% of the MCC population. *United States ex rel. Wolfish* v. *United States*, 428 F. Supp. 333, 335 (SDNY 1977). Prior to the District

The MCC differs markedly from the familiar image of a jail; there are no barred cells, dank, colorless corridors, or clanging steel gates. It was intended to include the most advanced and innovative features of modern design of detention facilities. As the Court of Appeals stated: "[I]t represented the architectural embodiment of the best and most progressive penological planning." 573 F. 2d, at 121. The key design element of the 12-story structure is the "modular" or "unit" concept, whereby each floor designed to house inmates has one or two largely self-contained residential units that replace the traditional cellblock jail construction. Each unit in turn has several clusters or corridors of private rooms or dormitories radiating from a central 2-story "multipurpose" or common room, to which each inmate has free access approximately 16 hours a day. Because our analysis does not turn on the particulars of the MCC concept or design, we need not discuss them further.

When the MCC opened in August 1975, the planned capacity was 449 inmates, an increase of 50% over the former West Street facility. *Id.*, at 122. Despite some dormitory accommodations, the MCC was designed primarily to house these inmates in 389 rooms, which originally were intended for single occupancy. While the MCC was under construction, however, the number of persons committed to pretrial detention began to rise at an "unprecedented" rate. *Ibid.* The Bureau of Prisons took several steps to accommodate this unexpected flow of persons assigned to the facility, but despite these efforts, the inmate population at the MCC rose above its planned capacity within a short time after its opening. To provide sleeping space for this increased population, the MCC

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Court's order, 50% of *all* MCC inmates spent less than 30 days at the facility and 73% less than 60 days. *United States ex rel. Wolfish* v. *Levi*, 439 F. Supp. 114, 127 (SDNY 1977). However, of the unsentenced detainees, over half spent less than 10 days at the MCC, three-quarters were released within a month and more than 85% were released within 60 days, *Wolfish* v. *Levi*, *supra*, at 129 n. 25.

replaced the single bunks in many of the individual rooms and dormitories with double bunks.[4] Also, each week some newly arrived inmates had to sleep on cots in the common areas until they could be transferred to residential rooms as space became available. See *id.*, at 127–128.

On November 28, 1975, less than four months after the MCC had opened, the named respondents initiated this action by filing in the District Court a petition for a writ of habeas corpus.[5] The District Court certified the case as a class action on behalf of all persons confined at the MCC, pretrial detainees and sentenced prisoners alike.[6] The petition served

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[4] Of the 389 residential rooms at the MCC, 121 had been "designated" for "double-bunking" at the time of the District Court's order. 428 F. Supp., at 336. The number of rooms actually housing two inmates, however, never exceeded 73 and, of these, only 35 were rooms in units that housed pretrial detainees. Brief for Petitioners 7 n. 6; Brief for Respondents 11–12; App. 33–35 (affidavit of Larry Taylor, MCC Warden, dated Dec. 29, 1976).

[5] It appears that the named respondents may now have been transferred or released from the MCC. See *United States ex rel. Wolfish* v. *Levi, supra,* at 119. "This case belongs, however, to that narrow class of cases in which the termination of a class representative's claim does not moot the claims of the unnamed members of the class." *Gerstein* v. *Pugh,* 420 U. S. 103, 110 n. 11 (1975); see *Sosna* v. *Iowa,* 419 U. S. 393 (1975). The named respondents had a case or controversy at the time the complaint was filed and at the time the class action was certified by the District Court pursuant to Fed. Rule Civ. Proc. 23, and there remains a live controversy between petitioners and the members of the class represented by the named respondents. See *Sosna* v. *Iowa, supra,* at 402. Finally, because of the temporary nature of confinement at the MCC, the issues presented are, as in *Sosna* and *Gerstein,* "capable of repetition, yet evading review." 419 U. S., at 400–401; 420 U. S., at 110 n. 11; see *Kremens* v. *Bartley,* 431 U. S. 119, 133 (1977). Accordingly, the requirements of Art. III are met and the case is not moot.

[6] Petitioners apparently never contested the propriety of respondents' use of a writ of habeas corpus to challenge the conditions of their confinement, and petitioners do not raise that question in this Court. However, respondents did plead an alternative basis for jurisdiction in their "Amended Petition" in the District Court—namely, 28 U. S. C. § 1361—

up a veritable potpourri of complaints that implicated virtually every facet of the institution's conditions and practices. Respondents charged, *inter alia*, that they had been deprived of their statutory and constitutional rights because of overcrowded conditions, undue length of confinement, improper searches, inadequate recreational, educational, and employment opportunities, insufficient staff, and objectionable restrictions on the purchase and receipt of personal items and books.[7]

In two opinions and a series of orders, the District Court enjoined numerous MCC practices and conditions. With respect to pretrial detainees, the court held that because they

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that arguably provides jurisdiction. And, at the time of the relevant orders of the District Court in this case, jurisdiction would have been provided by 28 U. S. C. § 1331 (a). Thus, we leave to another day the question of the propriety of using a writ of habeas corpus to obtain review of the conditions of confinement, as distinct from the fact or length of the confinement itself. See *Preiser* v. *Rodriguez*, 411 U. S. 475, 499–500 (1973). See generally *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U. S. 391 (1979).

Similarly, petitioners do not contest the District Court's certification of this case as a class action. For much the same reasons as identified above, there is no need in this case to reach the question whether Fed. Rule Civ. Proc. 23, providing for class actions, is applicable to petitions for habeas corpus relief. Accordingly, we express no opinion as to the correctness of the District Court's action in this regard. See *Middendorf* v. *Henry*, 425 U. S. 25, 30 (1976).

[7] The Court of Appeals described the breadth of this action as follows:

"As an indication of the scope of this action, the amended petition also decried the inadequate phone service; 'strip' searches; room searches outside the inmate's presence; a prohibition against the receipt of packages or the use of personal typewriters; interference with, and monitoring of, personal mail; inadequate and arbitrary disciplinary and grievance procedures; inadequate classification of prisoners; improper treatment of non-English speaking inmates; unsanitary conditions; poor ventilation; inadequate and unsanitary food; the denial of furloughs, unannounced transfers; improper restrictions on religious freedom; and an insufficient and inadequately trained staff." 573 F. 2d, at 123 n. 7.

are "presumed to be innocent and held only to ensure their presence at trial, 'any deprivation or restriction of . . . rights beyond those which are necessary for confinement alone, must be justified by a compelling necessity.' " *United States ex rel. Wolfish* v. *Levi*, 439 F. Supp. 114, 124 (1977), quoting *Detainees of Brooklyn House of Detention* v. *Malcolm*, 520 F. 2d 392, 397 (CA2 1975). And while acknowledging that the rights of sentenced inmates are to be measured by the different standard of the Eighth Amendment, the court declared that to house "an inferior minority of persons . . . in ways found unconstitutional for the rest" would amount to cruel and unusual punishment. *United States ex rel. Wolfish* v. *United States*, 428 F. Supp. 333, 339 (1977).[8]

Applying these standards on cross-motions for partial summary judgment, the District Court enjoined the practice of housing two inmates in the individual rooms and prohibited enforcement of the so-called "publisher-only" rule, which at the time of the court's ruling prohibited the receipt of all books and magazines mailed from outside the MCC except those sent directly from a publisher or a book club.[9] After a trial on the remaining issues, the District Court enjoined, *inter alia*, the doubling of capacity in the dormitory areas, the use of the common rooms to provide temporary sleeping accommodations, the prohibition against inmates' receipt of packages containing food and items of personal property, and the practice of requiring inmates to expose their body cavities for visual inspection following contact visits. The court also

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[8] While most of the District Court's rulings were based on constitutional grounds, the court also held that some of the actions of the Bureau of Prisons were subject to review under the Administrative Procedure Act (APA) and were "arbitrary and capricious" within the meaning of the APA. 439 F. Supp., at 122–123, 141; see n. 11, *infra*.

[9] The District Court also enjoined confiscation of inmate property by prison officials without supplying a receipt and, except under specified circumstances, the reading and inspection of inmates' outgoing and incoming mail. 428 F. Supp., at 341–344. Petitioners do not challenge these rulings.

granted relief in favor of pretrial detainees, but not convicted inmates, with respect to the requirement that detainees remain outside their rooms during routine inspections by MCC officials.[10]

The Court of Appeals largely affirmed the District Court's rulings, although it rejected that court's Eighth Amendment analysis of conditions of confinement for convicted prisoners because the "parameters of judicial intervention into . . . conditions . . . for sentenced prisoners are more restrictive than in the case of pretrial detainees." 573 F. 2d, at 125.[11] Ac-

[10] The District Court also granted respondents relief on the following issues: classification of inmates and movement between units; length of confinement; law library facilities; the commissary; use of personal typewriters; social and attorney visits; telephone service; inspection of inmates' mail; inmate uniforms; availability of exercise for inmates in administrative detention; food service; access to the bathroom in the visiting area; special diets for Muslim inmates; and women's "lock-in." 439 F. Supp., at 125–165. None of these rulings are before this Court.

[11] The Court of Appeals held that "[a]n institution's obligation under the eighth amendment is at an end if it furnishes sentenced prisoners with adequate food, clothing, shelter, sanitation, medical care, and personal safety." 573 F. 2d, at 125.

The Court of Appeals also held that the District Court's reliance on the APA was erroneous. See n. 8, *supra*. The Court of Appeals concluded that because the Bureau of Prisons' enabling legislation vests broad discretionary powers in the Attorney General, the administration of federal prisons constitutes " 'agency action . . . committed to agency discretion by law' " that is exempt from judicial review under the APA, at least in the absence of a breach of a specific statutory mandate. 573 F. 2d, at 125; see 5 U. S. C. § 701 (a)(2). Because of its holding that the APA was inapplicable to this case, the Court of Appeals reversed the District Court's rulings that the bathroom in the visiting area must be kept unlocked, that prison officials must make a certain level of local and long-distance telephone service available to MCC inmates, that the MCC must maintain unchanged its present schedule for social visits, and that the MCC must take commissary requests every other day. 573 F. 2d, at 125–126, and n. 16. Respondents have not cross petitioned from the Court of Appeals' disposition of the District Court's Eighth Amendment and APA rulings.

cordingly, the court remanded the matter to the District Court for it to determine whether the housing for sentenced inmates at the MCC was constitutionally "adequate." But the Court of Appeals approved the due process standard employed by the District Court in enjoining the conditions of pretrial confinement. It therefore held that the MCC had failed to make a showing of "compelling necessity" sufficient to justify housing two pretrial detainees in the individual rooms. *Id.*, at 126–127. And for purposes of our review (since petitioners challenge only some of the Court of Appeals' rulings), the court affirmed the District Court's granting of relief against the "publisher-only" rule, the practice of conducting body-cavity searches after contact visits, the prohibition against receipt of packages of food and personal items from outside the institution, and the requirement that detainees remain outside their rooms during routine searches of the rooms by MCC officials. *Id.*, at 129–132.[12]

## II

As a first step in our decision, we shall address "double-bunking" as it is referred to by the parties, since it is a condition of confinement that is alleged only to deprive pretrial detainees of their liberty without due process of law in contravention of the Fifth Amendment. We will treat in order the Court of Appeals' standard of review, the analysis which we believe the Court of Appeals should have employed,

[12] Although the Court of Appeals held that doubling the capacity of the dormitories was unlawful, it remanded for the District Court to determine "whether any number of inmates in excess of rated capacity could be suitably quartered within the dormitories." *Id.*, at 128. In view of the changed conditions resulting from this litigation, the court also remanded to the District Court for reconsideration of its order limiting incarceration of detainees at the MCC to a period less than 60 days. *Id.*, at 129. The court reversed the District Court's rulings that inmates be permitted to possess typewriters for their personal use in their rooms and that inmates not be required to wear uniforms. *Id.*, at 132–133. None of these rulings are before the Court.

and the conclusions to which our analysis leads us in the case of "double-bunking."

A

The Court of Appeals did not dispute that the Government may permissibly incarcerate a person charged with a crime but not yet convicted to ensure his presence at trial. However, reasoning from the "premise that an individual is to be treated as innocent until proven guilty," the court concluded that pretrial detainees retain the "rights afforded unincarcerated individuals," and that therefore it is not sufficient that the conditions of confinement for pretrial detainees "merely comport with contemporary standards of decency prescribed by the cruel and unusual punishment clause of the eighth amendment." 573 F. 2d, at 124. Rather, the court held, the Due Process Clause requires that pretrial detainees "be subjected to only those 'restrictions and privations' which 'inhere in their confinement itself or which are justified by compelling necessities of jail administration.'" *Ibid.*, quoting *Rhem* v. *Malcolm,* 507 F. 2d, at 336. Under the Court of Appeals' "compelling necessity" standard, "deprivation of the rights of detainees cannot be justified by the cries of fiscal necessity, . . . administrative convenience, . . . or by the cold comfort that conditions in other jails are worse." 573 F. 2d, at 124. The court acknowledged, however, that it could not "ignore" our admonition in *Procunier* v. *Martinez,* 416 U. S. 396, 405 (1974), that "courts are ill equipped to deal with the increasingly urgent problems of prison administration," and concluded that it would "not [be] wise for [it] to second-guess the expert administrators on matters on which they are better informed." 573 F. 2d, at 124.[13]

[13] The NAACP Legal Defense and Educational Fund, Inc., as *amicus curiae,* argues that federal courts have inherent authority to correct conditions of pretrial confinement and that the practices at issue in this case violate the Attorney General's alleged duty to provide inmates with "suitable quarters" under 18 U. S. C. § 4042 (2). Brief for the NAACP

Our fundamental disagreement with the Court of Appeals is that we fail to find a source in the Constitution for its compelling-necessity standard.[14] Both the Court of Appeals and the District Court seem to have relied on the "presumption of innocence" as the source of the detainee's substantive right to be free from conditions of confinement that are not justified by compelling necessity. 573 F. 2d, at 124; 439 F. Supp., at 124; accord, *Campbell* v. *McGruder*, 188 U. S. App. D. C. 258, 266, 580 F. 2d 521, 529 (1978); *Detainees of Brooklyn House of Detention* v. *Malcolm*, 520 F. 2d 392, 397 (CA2 1975); *Rhem* v. *Malcolm*, *supra*, at 336. But see *Feeley* v. *Sampson*, 570 F. 2d 364, 369 n. 4 (CA1 1978); *Hampton* v. *Holmesburg Prison Officials*, 546 F. 2d 1077, 1080 n. 1 (CA3 1976). But the presumption of innocence provides no support for such a rule.

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Legal Defense and Educational Fund, Inc., as *Amicus Curiae* 22–46. Neither argument was presented to or passed on by the lower courts; nor have they been urged by either party in this Court. Accordingly, we have no occasion to reach them in this case. *Knetsch* v. *United States*, 364 U. S. 361, 370 (1960).

[14] As authority for its compelling-necessity test, the court cited three of its prior decisions, *Rhem* v. *Malcolm*, 507 F. 2d 333 (CA2 1974) (*Rhem I*); *Detainees of Brooklyn House of Detention* v. *Malcolm*, 520 F. 2d 392 (CA2 1975); and *Rhem* v. *Malcolm*, 527 F. 2d 1041 (CA2 1975) (*Rhem II*). *Rhem I*'s support for the compelling-necessity test came from *Brenneman* v. *Madigan*, 343 F. Supp. 128, 142 (ND Cal. 1972), which in turn cited no cases in support of its statement of the relevant test. *Detainees* found support for the compelling-necessity standard in *Shapiro* v. *Thompson*, 394 U. S. 618 (1969); *Tate* v. *Short*, 401 U. S. 395 (1971); *Williams* v. *Illinois*, 399 U. S. 235 (1970); and *Shelton* v. *Tucker*, 364 U. S. 479 (1960). But *Tate* and *Williams* dealt with equal protection challenges to imprisonment based on inability to pay fines or costs. Similarly, *Shapiro* concerned equal protection challenges to state welfare eligibility requirements found to violate the constitutional right to travel. In *Shelton*, the Court held that a school board policy requiring disclosure of personal associations violated the First and Fourteenth Amendment rights of a teacher. None of these cases support the court's compelling-necessity test. Finally, *Rhem II* merely relied on *Rhem I* and *Detainees*.

The presumption of innocence is a doctrine that allocates the burden of proof in criminal trials; it also may serve as an admonishment to the jury to judge an accused's guilt or innocence solely on the evidence adduced at trial and not on the basis of suspicions that may arise from the fact of his arrest, indictment, or custody, or from other matters not introduced as proof at trial. *Taylor* v. *Kentucky,* 436 U. S. 478, 485 (1978); see *Estelle* v. *Williams,* 425 U. S. 501 (1976); *In re Winship,* 397 U. S. 358 (1970); 9 J. Wigmore, Evidence § 2511 (3d ed. 1940). It is "an inaccurate, shorthand description of the right of the accused to 'remain inactive and secure, until the prosecution has taken up its burden and produced evidence and effected persuasion; . . .' an 'assumption' that is indulged in the absence of contrary evidence." *Taylor* v. *Kentucky, supra,* at 484 n. 12. Without question, the presumption of innocence plays an important role in our criminal justice system. "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin* v. *United States,* 156 U. S. 432, 453 (1895). But it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun.

The Court of Appeals also relied on what it termed the "indisputable rudiments of due process" in fashioning its compelling-necessity test. We do not doubt that the Due Process Clause protects a detainee from certain conditions and restrictions of pretrial detainment. See *infra,* at 535–540. Nonetheless, that Clause provides no basis for application of a compelling-necessity standard to conditions of pretrial confinement that are not alleged to infringe any other, more specific guarantee of the Constitution.

It is important to focus on what is at issue here. We are not concerned with the initial decision to detain an accused and the curtailment of liberty that such a decision necessarily

entails. See *Gerstein* v. *Pugh*, 420 U. S. 103, 114 (1975); *United States* v. *Marion*, 404 U. S. 307, 320 (1971). Neither respondents nor the courts below question that the Government may permissibly detain a person suspected of committing a crime prior to a formal adjudication of guilt. See *Gerstein* v. *Pugh*, *supra*, at 111–114. Nor do they doubt that the Government has a substantial interest in ensuring that persons accused of crimes are available for trials and, ultimately, for service of their sentences, or that confinement of such persons pending trial is a legitimate means of furthering that interest. Tr. of Oral Arg. 27; see *Stack* v. *Boyle*, 342 U. S. 1, 4 (1951).[15] Instead, what *is* at issue when an aspect of pretrial detention that is not alleged to violate any express guarantee of the Constitution is challenged, is the detainee's right to be free from punishment, see *infra*, at 535–537, and his understandable desire to be as comfortable as possible during his confinement, both of which may conceivably coalesce at some point. It seems clear that the Court of Appeals did not rely on the detainee's right to be free from punishment, but even if it had that right does not warrant adoption of that court's compelling-necessity test. See *infra*, at 535–540. And to the extent the court relied on the detainee's desire to be free from discomfort, it suffices to say that this desire simply does not rise to the level of those fundamental liberty interests delineated in cases such as *Roe* v. *Wade*, 410 U. S. 113 (1973);

[15] In order to imprison a person prior to trial, the Government must comply with constitutional requirements, *Gerstein* v. *Pugh*, 420 U. S., at 114; *Stack* v. *Boyle*, 342 U. S., at 5, and any applicable statutory provisions, *e. g.*, 18 U. S. C. §§ 3146, 3148. Respondents do not allege that the Government failed to comply with the constitutional or statutory requisites to pretrial detention.

The only justification for pretrial detention asserted by the Government is to ensure the detainees' presence at trial. Brief for Petitioners 43. Respondents do not question the legitimacy of this goal. Brief for Respondents 33; Tr. of Oral Arg. 27. We, therefore, have no occasion to consider whether any other governmental objectives may constitutionally justify pretrial detention.

*Eisenstadt* v. *Baird*, 405 U. S. 438 (1972); *Stanley* v. *Illinois*, 405 U. S. 645 (1972); *Griswold* v. *Connecticut*, 381 U. S. 479 (1965); *Meyer* v. *Nebraska*, 262 U. S. 390 (1923).

## B

In evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law, we think that the proper inquiry is whether those conditions amount to punishment of the detainee.[16] For under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.[17]

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[16] The Court of Appeals properly relied on the Due Process Clause rather than the Eighth Amendment in considering the claims of pretrial detainees. Due process requires that a pretrial detainee not be punished. A sentenced inmate, on the other hand, may be punished, although that punishment may not be "cruel and unusual" under the Eighth Amendment. The Court recognized this distinction in *Ingraham* v. *Wright*, 430 U. S. 651, 671–672, n. 40 (1977):

"Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions. See *United States* v. *Lovett*, 328 U. S. 303, 317–318 (1946). . . . [T]he State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law. Where the State seeks to impose punishment without such an adjudication, the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment."

[17] MR. JUSTICE STEVENS in dissent claims that this holding constitutes a departure from our prior due process cases, specifically *Leis* v. *Flynt*, 439 U. S. 438 (1979), and *Paul* v. *Davis*, 424 U. S. 693 (1976). *Post*, at 580–581, and n. 6. But as the citations following our textual statement indicate, we leave prior decisional law as we find it and simply apply it to the case at bar. For example, in *Wong Wing* v. *United States*, 163 U. S. 228, 237 (1896), the Court held that the subjection of persons to punishment at hard labor must be preceded by a judicial trial to establish guilt. And in *Ingraham* v. *Wright*, *supra*, at 674, we stated that "at least where school authorities, acting under color of state law, deliberately

See *Ingraham* v. *Wright*, 430 U. S. 651, 671–672 n. 40, 674 (1977); *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 165–167, 186 (1963); *Wong Wing* v. *United States*, 163 U. S. 228, 237 (1896). A person lawfully committed to pretrial detention has not been adjudged guilty of any crime. He has had only a "judicial determination of probable cause as a prerequisite to [the] extended restraint of [his] liberty following arrest." *Gerstein* v. *Pugh*, *supra*, at 114; see *Virginia* v. *Paul*, 148 U. S. 107, 119 (1893). And, if he is detained for a suspected violation of a federal law, he also has had a bail hearing. See 18 U. S. C. §§ 3146, 3148.[18] Under such circumstances, the Government concededly may detain him to ensure his presence at trial and may subject him to the restrictions and conditions of the detention facility so long as those conditions and restric-

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decide to *punish* a child for misconduct by restraining the child and inflicting appreciable physical pain, we hold that Fourteenth Amendment liberty interests are implicated." (Emphasis supplied.) Thus, there is neither novelty nor inconsistency in our holding that the Fifth Amendment includes freedom from punishment within the liberty of which no person may be deprived without due process of law.

We, of course, do not mean by the textual discussion of the rights of pretrial detainees to cast doubt on any historical exceptions to the general principle that punishment can only follow a determination of guilt after trial or plea—exceptions such as the power summarily to punish for contempt of court. See, *e. g.*, *United States* v. *Wilson*, 421 U. S. 309 (1975); *Bloom* v. *Illinois*, 391 U. S. 194 (1968); *United States* v. *Barnett*, 376 U. S. 681 (1964); *Cooke* v. *United States*, 267 U. S. 517 (1925); *Ex parte Terry*, 128 U. S. 289 (1888); Fed. Rule Crim. Proc. 42.

[18] The Bail Reform Act of 1966 establishes a liberal policy in favor of pretrial release. 18 U. S. C. §§ 3146, 3148. Section 3146 provides in pertinent part:

"Any person charged with an offense, other than an offense punishable by death, shall, at his appearance before a judicial officer, be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer, unless the officer determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required."

tions do not amount to punishment, or otherwise violate the Constitution.

Not every disability imposed during pretrial detention amounts to "punishment" in the constitutional sense, however. Once the Government has exercised its conceded authority to detain a person pending trial, it obviously is entitled to employ devices that are calculated to effectuate this detention. Traditionally, this has meant confinement in a facility which, no matter how modern or how antiquated, results in restricting the movement of a detainee in a manner in which he would not be restricted if he simply were free to walk the streets pending trial. Whether it be called a jail, a prison, or a custodial center, the purpose of the facility is to detain. Loss of freedom of choice and privacy are inherent incidents of confinement in such a facility. And the fact that such detention interferes with the detainee's understandable desire to live as comfortably as possible and with as little restraint as possible during confinement does not convert the conditions or restrictions of detention into "punishment."

This Court has recognized a distinction between punitive measures that may not constitutionally be imposed prior to a determination of guilt and regulatory restraints that may. See, *e. g., Kennedy* v. *Mendoza-Martinez, supra,* at 168; *Flemming* v. *Nestor,* 363 U. S. 603, 613–614 (1960); cf. *De Veau* v. *Braisted,* 363 U. S. 144, 160 (1960). In *Kennedy* v. *Mendoza-Martinez, supra,* the Court examined the automatic forfeiture-of-citizenship provisions of the immigration laws to determine whether that sanction amounted to punishment or a mere regulatory restraint. While it is all but impossible to compress the distinction into a sentence or a paragraph, the Court there described the tests traditionally applied to determine whether a governmental act is punitive in nature:

> "Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding

> of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions." 372 U. S., at 168–169 (footnotes omitted).

Because forfeiture of citizenship traditionally had been considered punishment and the legislative history of the forfeiture provisions "conclusively" showed that the measure was intended to be punitive, the Court held that forfeiture of citizenship in such circumstances constituted punishment that could not constitutionally be imposed without due process of law. *Id.*, at 167–170, 186.

The factors identified in *Mendoza-Martinez* provide useful guideposts in determining whether particular restrictions and conditions accompanying pretrial detention amount to punishment in the constitutional sense of that word. A court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose. See *Flemming* v. *Nestor*, *supra*, at 613–617.[19] Absent a showing of an expressed intent to punish on the part of detention facility officials, that determination generally will turn on "whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]." *Kennedy* v. *Mendoza-Martinez*, *supra*, at 168–169; see *Flemming* v.

[19] As Mr. Justice Frankfurter stated in *United States* v. *Lovett*, 328 U. S. 303, 324 (1946) (concurring opinion): "The fact that harm is inflicted by governmental authority does not make it punishment. Figuratively speaking all discomforting action may be deemed punishment because it deprives of what otherwise would be enjoyed. But there may be reasons other than punitive for such deprivation."

*Nestor, supra,* at 617. Thus, if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to "punishment." [20] Conversely, if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees. See *ibid.*[21] Courts must be mindful that these inquiries spring from constitutional requirements and that judicial answers to them must reflect that fact rather than a court's idea of how best to operate a detention facility. Cf. *United States* v. *Lovasco,* 431 U. S. 783, 790 (1977); *United States* v. *Russell,* 411 U. S. 423, 435 (1973).

One further point requires discussion. The petitioners assert, and respondents concede, that the "essential objective of pretrial confinement is to insure the detainees' presence at trial." Brief for Petitioners 43; see Brief for Respondents 33. While this interest undoubtedly justifies the original decision to confine an individual in some manner, we do not accept

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[20] This is not to say that the officials of a detention facility can justify punishment. They cannot. It is simply to say that in the absence of a showing of intent to punish, a court must look to see if a particular restriction or condition, which may on its face appear to be punishment, is instead but an incident of a legitimate nonpunitive governmental objective. See *Kennedy* v. *Mendoza-Martinez,* 372 U. S., at 168; *Flemming* v. *Nestor,* 363 U. S., at 617. Retribution and deterrence are not legitimate nonpunitive governmental objectives. *Kennedy* v. *Mendoza-Martinez, supra,* at 168. Conversely, loading a detainee with chains and shackles and throwing him in a dungeon may ensure his presence at trial and preserve the security of the institution. But it would be difficult to conceive of a situation where conditions so harsh, employed to achieve objectives that could be accomplished in so many alternative and less harsh methods, would not support a conclusion that the purpose for which they were imposed was to punish.

[21] "There is, of course, a *de minimis* level of imposition with which the Constitution is not concerned." *Ingraham* v. *Wright,* 430 U. S., at 674.

respondents' argument that the Government's interest in ensuring a detainee's presence at trial is the *only* objective that may justify restraints and conditions once the decision is lawfully made to confine a person. "If the government could confine or otherwise infringe the liberty of detainees only to the extent necessary to ensure their presence at trial, house arrest would in the end be the only constitutionally justified form of detention." *Campbell* v. *McGruder,* 188 U. S. App. D. C., at 266, 580 F. 2d, at 529. The Government also has legitimate interests that stem from its need to manage the facility in which the individual is detained. These legitimate operational concerns may require administrative measures that go beyond those that are, strictly speaking, necessary to ensure that the detainee shows up at trial. For example, the Government must be able to take steps to maintain security and order at the institution and make certain no weapons or illicit drugs reach detainees.[22] Restraints that are reasonably related to the institution's interest in maintaining jail security do not, without more, constitute unconstitutional punishment, even if they are discomforting and are restrictions that the detainee would not have experienced had he been released while awaiting trial. We need not here attempt to detail the precise extent of the legitimate governmental interests that may justify conditions or restrictions of pretrial detention. It is enough simply to recognize that in addition to ensuring the detainees' presence at trial, the effective management of the detention facility once the individual is confined is a valid objective that may justify imposition of conditions and restrictions of pretrial detention and dispel any inference that such restrictions are intended as punishment.[23]

[22] In fact, security measures may directly serve the Government's interest in ensuring the detainee's presence at trial. See *Feeley* v. *Sampson,* 570 F. 2d, at 369.

[23] In determining whether restrictions or conditions are reasonably related to the Government's interest in maintaining security and order and operating the institution in a manageable fashion, courts must heed

C

Judged by this analysis, respondents' claim that "double-bunking" violated their due process rights fails. Neither the District Court nor the Court of Appeals intimated that it considered "double-bunking" to constitute punishment; instead, they found that it contravened the compelling-necessity test, which today we reject. On this record, we are convinced as a matter of law that "double-bunking" as practiced at the MCC did not amount to punishment and did not, therefore, violate respondents' rights under the Due Process Clause of the Fifth Amendment.[24]

Each of the rooms at the MCC that house pretrial detainees has a total floor space of approximately 75 square feet. Each of them designated for "double-bunking," see n. 4, *supra*, contains a double bunkbed, certain other items of furniture, a wash basin, and an uncovered toilet. Inmates generally are locked into their rooms from 11 p.m. to 6:30 a.m. and for brief periods during the afternoon and evening head counts. During the rest of the day, they may move about freely between their rooms and the common areas.

Based on affidavits and a personal visit to the facility, the District Court concluded that the practice of "double-bunking" was unconstitutional. The court relied on two factors for its conclusion: (1) the fact that the rooms were designed to house only one inmate, 428 F. Supp., at 336–337; and (2) its judg-

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our warning that "[s]uch considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters." *Pell* v. *Procunier*, 417 U. S., at 827; see *Jones* v. *North Carolina Prisoners' Labor Union*, 433 U. S. 119 (1977); *Meachum* v. *Fano*, 427 U. S. 215 (1976); *Procunier* v. *Martinez*, 416 U. S. 396 (1974).

[24] The District Court found that there were no disputed issues of material fact with respect to respondents' challenge to "double-bunking." 428 F. Supp., at 335. We agree with the District Court in this determination.

ment that confining two persons in one room or cell of this size constituted a "fundamental denia[l] of decency, privacy, personal security, and, simply, civilized humanity . . . ." *Id.*, at 339. The Court of Appeals agreed with the District Court. In response to petitioners' arguments that the rooms at the MCC were larger and more pleasant than the cells involved in the cases relied on by the District Court, the Court of Appeals stated:

> "[W]e find the lack of privacy inherent in double-celling in rooms intended for one individual a far more compelling consideration than a comparison of square footage or the substitution of doors for bars, carpet for concrete, or windows for walls. The government has simply failed to show any substantial justification for double-celling." 573 F. 2d, at 127.

We disagree with both the District Court and the Court of Appeals that there is some sort of "one man, one cell" principle lurking in the Due Process Clause of the Fifth Amendment. While confining a given number of people in a given amount of space in such a manner as to cause them to endure genuine privations and hardship over an extended period of time might raise serious questions under the Due Process Clause as to whether those conditions amounted to punishment, nothing even approaching such hardship is shown by this record.[25]

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[25] Respondents seem to argue that "double-bunking" was unreasonable because petitioners were able to comply with the District Court's order forbidding "double-bunking" and still accommodate the increased numbers of detainees simply by transferring all but a handful of sentenced inmates who had been assigned to the MCC for the purpose of performing certain services and by committing those tasks to detainees. Brief for Respondents 50. That petitioners were able to comply with the District Court's order in this fashion does not mean that petitioners' chosen method of coping with the increased inmate population—"double-bunking"—was unreasonable. Governmental action does not have to be the only alternative or even the best alternative for it to be reasonable, to say nothing of constitu-

Detainees are required to spend only seven or eight hours each day in their rooms, during most or all of which they presumably are sleeping. The rooms provide more than adequate space for sleeping.[26] During the remainder of the time, the detainees are free to move between their rooms and the common area. While "double-bunking" may have taxed some of the equipment or particular facilities in certain of the common areas, *United States ex rel. Wolfish* v. *United States*, 428 F. Supp., at 337, this does not mean that the conditions at the MCC failed to meet the standards required by the Constitution. Our conclusion in this regard is further buttressed by the detainees' length of stay at the MCC. See *Hutto* v. *Finney*, 437 U. S. 678, 686–687 (1978). Nearly all of the detainees are released within 60 days. See n. 3, *supra*. We simply do not believe that requiring a detainee to share toilet facilities and this admittedly rather small sleeping place with another person for generally a maximum period of 60 days violates the Constitution.[27]

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tional. See *Vance* v. *Bradley*, 440 U. S. 93 (1979); *Dandridge* v. *Williams*, 397 U. S. 471, 485 (1970).

That petitioners were able to comply with the District Court order also does not make this case moot, because petitioners still dispute the legality of the court's order and they have informed the Court that there is a reasonable expectation that they may be required to "double-bunk" again. Reply Brief for Petitioners 6; Tr. of Oral Arg. 33–35, 56–57; see *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 632–633 (1953).

[26] We thus fail to understand the emphasis of the Court of Appeals and the District Court on the amount of walking space in the "double-bunked" rooms. See 573 F. 2d, at 127; 428 F. Supp., at 337.

[27] Respondents' reliance on other lower court decisions concerning minimum space requirements for different institutions and on correctional standards issued by various groups is misplaced. Brief for Respondents 41, and nn. 40 and 41; see, *e. g.*, *Campbell* v. *McGruder*, 188 U. S. App. D. C. 258, 580 F. 2d 521 (1978); *Battle* v. *Anderson*, 564 F. 2d 388 (CA10 1977); *Chapman* v. *Rhodes*, 434 F. Supp. 1007 (SD Ohio 1977); *Inmates of Suffolk County Jail* v. *Eisenstadt*, 360 F. Supp. 676 (Mass. 1973); American Public Health Assn., Standards for Health Services in Correctional Institutions 62 (1976); American Correctional Assn., Manual of

## III

Respondents also challenged certain MCC restrictions and practices that were designed to promote security and order at the facility on the ground that these restrictions violated the Due Process Clause of the Fifth Amendment, and certain other constitutional guarantees, such as the First and Fourth Amendments. The Court of Appeals seemed to approach the challenges to security restrictions in a fashion different from the other contested conditions and restrictions. It stated that "once it has been determined that the mere fact of confinement of the detainee justifies the restrictions, the institution must be permitted to use reasonable means to insure that its legitimate interests in security are safeguarded." 573 F. 2d, at 124. The court might disagree with the choice of means to effectuate those interests, but it should not "second-guess the expert administrators on matters on which they are better informed . . . . Concern with minutiae of prison administration can only distract the court from detached consideration of the one overriding question presented to it: does the practice or condition violate the Constitution?" *Id.*, at 124–125. Nonetheless, the court affirmed the District Court's injunction

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Standards for Adult Correctional Institutions, Standard No. 4142, p. 27 (1977); National Sheriffs' Assn., A Handbook on Jail Architecture 63 (1975). The cases cited by respondents concerned facilities markedly different from the MCC. They involved traditional jails and cells in which inmates were locked during most of the day. Given this factual disparity, they have little or no application to the case at hand. Thus, we need not and do not decide whether we agree with the reasoning and conclusions of these cases. And while the recommendations of these various groups may be instructive in certain cases, they simply do not establish the constitutional minima; rather, they establish goals recommended by the organization in question. For this same reason, the draft recommendations of the Federal Corrections Policy Task Force of the Department of Justice regarding conditions of confinement for pretrial detainees are not determinative of the requirements of the Constitution. See Dept. of Justice, Federal Corrections Policy Task Force, Federal Standards for Corrections (Draft, June 1978).

against several security restrictions. The court rejected the arguments of petitioners that these practices served the MCC's interest in security and order and held that the practices were unjustified interferences with the retained constitutional rights of *both* detainees and convicted inmates. *Id.*, at 129–132. In our view, the Court of Appeals failed to heed its own admonition not to "second-guess" prison administrators.

Our cases have established several general principles that inform our evaluation of the constitutionality of the restrictions at issue. First, we have held that convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison. See *Jones* v. *North Carolina Prisoners' Labor Union,* 433 U. S. 119, 129 (1977); *Meachum* v. *Fano,* 427 U. S. 215, 225 (1976); *Wolff* v. *McDonnell,* 418 U. S. 539, 555–556 (1974); *Pell* v. *Procunier,* 417 U. S. 817, 822 (1974). "There is no iron curtain drawn between the Constitution and the prisons of this country." *Wolff* v. *McDonnell, supra,* at 555–556. So, for example, our cases have held that sentenced prisoners enjoy freedom of speech and religion under the First and Fourteenth Amendments, see *Pell* v. *Procunier, supra; Cruz* v. *Beto,* 405 U. S. 319 (1972); *Cooper* v. *Pate,* 378 U. S. 546 (1964); that they are protected against invidious discrimination on the basis of race under the Equal Protection Clause of the Fourteenth Amendment, see *Lee* v. *Washington,* 390 U. S. 333 (1968); and that they may claim the protection of the Due Process Clause to prevent additional deprivation of life, liberty, or property without due process of law, see *Meachum* v. *Fano, supra; Wolff* v. *McDonnell, supra. A fortiori,* pretrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners.

But our cases also have insisted on a second proposition: simply because prison inmates retain certain constitutional rights does not mean that these rights are not subject to restrictions and limitations. "Lawful incarceration brings

about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price* v. *Johnston*, 334 U. S. 266, 285 (1948); see *Jones* v. *North Carolina Prisoners' Labor Union, supra*, at 125; *Wolff* v. *McDonnell, supra*, at 555; *Pell* v. *Procunier, supra*, at 822. The fact of confinement as well as the legitimate goals and policies of the penal institution limits these retained constitutional rights. *Jones* v. *North Carolina Prisoners' Labor Union, supra*, at 125; *Pell* v. *Procunier, supra*, at 822. There must be a "mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application." *Wolff* v. *McDonnell, supra*, at 556. This principle applies equally to pretrial detainees and convicted prisoners. A detainee simply does not possess the full range of freedoms of an unincarcerated individual.

Third, maintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees.[28] "[C]entral to all other corrections goals is the institutional

[28] Neither the Court of Appeals nor the District Court distinguished between pretrial detainees and convicted inmates in reviewing the challenged security practices, and we see no reason to do so. There is no basis for concluding that pretrial detainees pose any lesser security risk than convicted inmates. Indeed, it may be that in certain circumstances they present a greater risk to jail security and order. See, *e. g.*, *Main Road* v. *Aytch*, 565 F. 2d, at 57. In the federal system, a detainee is committed to the detention facility only because no other less drastic means can reasonably assure his presence at trial. See 18 U. S. C. § 3146. As a result, those who are detained prior to trial may in many cases be individuals who are charged with serious crimes or who have prior records. They also may pose a greater risk of escape than convicted inmates. See Joint App. in Nos. 77-2035, 77-2135 (CA2), pp. 1393-1398, 1531-1532. This may be particularly true at facilities like the MCC, where the resident convicted inmates have been sentenced to only short terms of incarceration and many of the detainees face the possibility of lengthy imprisonment if convicted.

consideration of internal security within the corrections facilities themselves." *Pell* v. *Procunier, supra,* at 823; see *Jones v. North Carolina Prisoners' Labor Union, supra,* at 129; *Procunier* v. *Martinez,* 416 U. S. 396, 412 (1974). Prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel and to prevent escape or unauthorized entry. Accordingly, we have held that even when an institutional restriction infringes a specific constitutional guarantee, such as the First Amendment, the practice must be evaluated in the light of the central objective of prison administration, safeguarding institutional security. *Jones* v. *North Carolina Prisoners' Labor Union, supra,* at 129; *Pell* v. *Procunier, supra,* at 822, 826; *Procunier* v. *Martinez, supra,* at 412–414.

Finally, as the Court of Appeals correctly acknowledged, the problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. *Jones* v. *North Carolina Prisoners' Labor Union, supra,* at 128; *Procunier* v. *Martinez, supra,* at 404–405; *Cruz* v. *Beto, supra,* at 321; see *Meachum* v. *Fano,* 427 U. S., at 228–229.[29] "Such

[29] Respondents argue that this Court's cases holding that substantial deference should be accorded prison officials are not applicable to this case because those decisions concerned convicted inmates, not pretrial detainees. Brief for Respondents 52. We disagree. Those decisions held that courts should defer to the informed discretion of prison administrators because the realities of running a corrections institution are complex and difficult, courts are ill equipped to deal with these problems, and the management of these facilities is confided to the Executive and Legislative Branches, not to the Judicial Branch. See *Jones* v. *North Carolina Prisoners' Labor Union,* 433 U. S., at 126; *Pell* v. *Procunier,* 417 U. S., at 827; *Procunier* v. *Martinez,* 416 U. S., at 404–405. While those cases each concerned restrictions governing convicted inmates, the principle of deference enunciated in them is not dependent on that happenstance.

considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters." *Pell* v. *Procunier,* 417 U. S., at 827.[30] We further observe that, on occasion, prison administrators may be "experts" only by Act of Congress or of a state legislature. But judicial deference is accorded not merely because the administrator ordinarily will, as a matter of fact in a particular case, have a better grasp of his domain than the reviewing judge, but also because the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial. *Procunier* v. *Martinez, supra,* at 405; cf. *Meachum* v. *Fano, supra,* at 229. With these teachings of our cases in mind, we turn to an examination of the MCC security practices that are alleged to violate the Constitution.

A

At the time of the lower courts' decisions, the Bureau of Prisons' "publisher-only" rule, which applies to all Bureau

[30] What the Court said in *Procunier* v. *Martinez* bears repeating here: "Prison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody. The Herculean obstacles to effective discharge of these duties are too apparent to warrant explication. Suffice it to say that the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism." *Ibid.*

facilities, permitted inmates to receive books and magazines from outside the institution only if the materials were mailed directly from the publisher or a book club. 573 F. 2d, at 129–130. The warden of the MCC stated in an affidavit that "serious" security and administrative problems were caused when bound items were received by inmates from unidentified sources outside the facility. App. 24. He noted that in order to make a "proper and thorough" inspection of such items, prison officials would have to remove the covers of hardback books and to leaf through every page of all books and magazines to ensure that drugs, money, weapons, or other contraband were not secreted in the material. "This search process would take a substantial and inordinate amount of available staff time." *Ibid.* However, "there is relatively little risk that material received directly from a publisher or book club would contain contraband, and therefore, the security problems are significantly reduced without a drastic drain on staff resources." *Ibid.*

The Court of Appeals rejected these security and administrative justifications and affirmed the District Court's order enjoining enforcement of the "publisher-only" rule at the MCC. The Court of Appeals held that the rule "severely and impermissibly restricts the reading material available to inmates" and therefore violates their First Amendment and due process rights. 573 F. 2d, at 130.

It is desirable at this point to place in focus the precise question that now is before this Court. Subsequent to the decision of the Court of Appeals, the Bureau of Prisons amended its "publisher-only" rule to permit the receipt of books and magazines from bookstores as well as publishers and book clubs. 43 Fed. Reg. 30576 (1978) (to be codified in 28 CFR § 540.71). In addition, petitioners have informed the Court that the Bureau proposes to amend the rule further to allow receipt of paperback books, magazines, and other soft-covered materials from any source. Brief for Petitioners 66 n. 49, 69, and n. 51. The Bureau regards hardback books as

the "more dangerous source of risk to institutional security," however, and intends to retain the prohibition against receipt of hardback books unless they are mailed directly from publishers, book clubs, or bookstores. *Id.*, at 69 n. 51. Accordingly, petitioners request this Court to review the District Court's injunction only to the extent it enjoins petitioners from prohibiting receipt of hard-cover books that are not mailed directly from publishers, book clubs, or bookstores. *Id.*, at 69; Tr. of Oral Arg. 59–60.[31]

We conclude that a prohibition against receipt of hardback books unless mailed directly from publishers, book clubs, or bookstores does not violate the First Amendment rights of MCC inmates. That limited restriction is a rational response by prison officials to an obvious security problem. It hardly

[31] Because of the changes in the "publisher-only" rule, some of which apparently occurred after we granted certiorari, respondents, citing *Sanks* v. *Georgia*, 401 U. S. 144 (1971), urge the Court to dismiss the writ of certiorari as improvidently granted with respect to the validity of the rule, as modified. Brief for Respondents 68. *Sanks*, however, is quite different from the instant case. In *Sanks* the events that transpired after probable jurisdiction was noted "had so drastically undermined the premises on which we originally set [the] case for plenary consideration as to lead us to conclude that, with due regard for the proper functioning of this Court, we should not . . . adjudicate it." 401 U. S., at 145. The focus of that case had been "completely blurred, if not altogether obliterated," and a judgment on the issues involved had become "potentially immaterial." *Id.*, at 152. This is not true here. Unlike the situation in *Sanks*, the Government has not substituted an entirely different regulatory scheme and wholly abandoned the restrictions that were invalidated below. There is still a dispute, which is not "blurred" or "obliterated," on which a judgment will not be "immaterial." Petitioners merely have chosen to limit their disagreement with the lower courts' rulings. Also, the question that is now posed is fairly comprised within the questions presented in the petition for certiorari. See Pet. for Cert. 2 ("[w]hether the governmental interest in maintaining jail security and order justifies rules that . . . (b) prohibit receipt at the jail of books and magazines that are not mailed directly from publishers"). See this Court's Rule 23 (1)(c). We, of course, express no view as to the validity of those portions of the lower courts' rulings that concern magazines or soft-cover books.

needs to be emphasized that hardback books are especially serviceable for smuggling contraband into an institution; money, drugs, and weapons easily may be secreted in the bindings. *E. g., Woods* v. *Daggett,* 541 F. 2d 237 (CA10 1976).[32] They also are difficult to search effectively. There is simply no evidence in the record to indicate that MCC officials have exaggerated their response to this security problem and to the administrative difficulties posed by the necessity of carefully inspecting each book mailed from unidentified sources. Therefore, the considered judgment of these experts must control in the absence of prohibitions far more sweeping than those involved here. See *Jones* v. *North Carolina Prisoners' Labor Union,* 433 U. S., at 128; *Pell* v. *Procunier,* 417 U. S., at 827.

Our conclusion that this limited restriction on receipt of hardback books does not infringe the First Amendment rights of MCC inmates is influenced by several other factors. The rule operates in a neutral fashion, without regard to the content of the expression. *Id.,* at 828. And there are alternative means of obtaining reading material that have not been shown to be burdensome or insufficient. "[W]e regard the

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[32] The District Court stated: "With no record of untoward experience at places like the MCC, and with no history of resort to less restrictive measures, [petitioners'] invocation of security cannot avail with respect to the high constitutional interests here at stake." 428 F. Supp., at 340. We rejected this line of reasoning in *Jones* v. *North Carolina Prisoners' Labor Union,* 433 U. S., at 132–133, where we stated: "Responsible prison officials must be permitted to take reasonable steps to forestall . . . threat[s to security], and they must be permitted to act before the time when they can compile a dossier on the eve of a riot." We reject it again, now. In *Jones,* we also emphasized that the "informed discretion of prison officials that there is *potential* danger may be sufficient for limiting rights even though this showing might be 'unimpressive if . . . submitted as justification for governmental restriction of personal communication among members of the general public.'" (Emphasis added.) *Id.,* at 133 n. 9, quoting *Pell* v. *Procunier,* 417 U. S., at 825; see *Procunier* v. *Martinez,* 416 U. S., at 414.

available 'alternative means of [communication as] a relevant factor' in a case such as this where 'we [are] called upon to balance First Amendment rights against [legitimate] governmental . . . interests.'" *Id.*, at 824, quoting *Kleindienst* v. *Mandel*, 408 U. S. 753, 765 (1972); see *Cruz* v. *Beto*, 405 U. S., at 321, 322 n. 2. The restriction, as it is now before us, allows soft-bound books and magazines to be received from any source and hardback books to be received from publishers, bookstores, and book clubs. In addition, the MCC has a "relatively large" library for use by inmates. *United States ex rel. Wolfish* v. *United States*, 428 F. Supp., at 340.[33] To the limited extent the rule might possibly increase the cost of obtaining published materials, this Court has held that where "other avenues" remain available for the receipt of materials by inmates, the loss of "cost advantages does not fundamentally implicate *free speech* values." See *Jones* v. *North Carolina Prisoners' Labor Union, supra*, at 130–131. We are also influenced in our decision by the fact that the rule's impact on pretrial detainees is limited to a maximum period of approximately 60 days. See n. 3, *supra*. In sum, considering all the circumstances, we view the rule, as we now find it, to be a "reasonable 'time, place and manner' regulatio[n that is] necessary to further significant governmental interests . . . ." *Grayned* v. *City of Rockford*, 408 U. S. 104, 115 (1972); see *Cox* v. *New Hampshire*, 312 U. S. 569, 575–576 (1941); *Cox* v. *Louisiana*, 379 U. S. 536, 554–555 (1965); *Adderley* v. *Florida*, 385 U. S. 39, 46–48 (1966).

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[33] The general library consists of more than 3,000 hardback books, which include general reference texts and fiction and nonfiction works, and more than 5,000 assorted paperbacks, including fiction and nonfiction. The MCC offers for sale to inmates four daily newspapers and certain magazines. Joint App. in Nos. 77-2035, 77-2135 (CA2), pp. 102–103 (affidavit of Robert Harris, MCC Education Specialist, dated Oct. 19, 1976). Other paperback books and magazines are donated periodically and distributed among the units for inmate use. *United States ex rel. Wolfish* v. *Levi*, 439 F. Supp., at 131.

## B

Inmates at the MCC were not permitted to receive packages from outside the facility containing items of food or personal property, except for one package of food at Christmas. This rule was justified by MCC officials on three grounds. First, officials testified to "serious" security problems that arise from the introduction of such packages into the institution, the "traditional file in the cake kind of situation" as well as the concealment of drugs "in heels of shoes [and] seams of clothing." App. 80; see *id.*, at 24, 84–85. As in the case of the "publisher-only" rule, the warden testified that if such packages were allowed, the inspection process necessary to ensure the security of the institution would require a "substantial and inordinate amount of available staff time." *Id.*, at 24. Second, officials were concerned that the introduction of personal property into the facility would increase the risk of thefts, gambling, and inmate conflicts, the "age-old problem of you have it and I don't." *Id.*, at 80; see *id.*, at 85. Finally, they noted storage and sanitary problems that would result from inmates' receipt of food packages. *Id.*, at 67, 80. Inmates are permitted, however, to purchase certain items of food and personal property from the MCC commissary.[34]

The District Court dismissed these justifications as "dire predictions." It was unconvinced by the asserted security problems because other institutions allow greater ownership of personal property and receipt of packages than does the MCC. And because the MCC permitted inmates to purchase items in the commissary, the court could not accept official fears of increased theft, gambling, or conflicts if packages were allowed. Finally, it believed that sanitation could be assured by proper housekeeping regulations. Accordingly, it ordered the MCC to promulgate regulations to permit receipt of at least items of the kind that are available in the commissary.

[34] Inmates are permitted to spend a total of $15 per week or up to $50 per month at the commissary. *Id.*, at 132.

439 F. Supp., at 152–153. The Court of Appeals accepted the District Court's analysis and affirmed, although it noted that the MCC could place a ceiling on the permissible dollar value of goods received and restrict the number of packages. 573 F. 2d, at 132.

Neither the District Court nor the Court of Appeals identified which provision of the Constitution was violated by this MCC restriction. We assume, for present purposes, that their decisions were based on the Due Process Clause of the Fifth Amendment, which provides protection for convicted prisoners and pretrial detainees alike against the deprivation of their property without due process of law. See *supra*, at 545. But as we have stated, these due process rights of prisoners and pretrial detainees are not absolute; they are subject to reasonable limitation or retraction in light of the legitimate security concerns of the institution.

We think that the District Court and the Court of Appeals have trenched too cavalierly into areas that are properly the concern of MCC officials. It is plain from their opinions that the lower courts simply disagreed with the judgment of MCC officials about the extent of the security interests affected and the means required to further those interests. But our decisions have time and again emphasized that this sort of unguided substitution of judicial judgment for that of the expert prison administrators on matters such as this is inappropriate. See *Jones* v. *North Carolina Prisoners' Labor Union; Pell* v. *Procunier; Procunier* v. *Martinez*. We do not doubt that the rule devised by the District Court and modified by the Court of Appeals may be a reasonable way of coping with the problems of security, order, and sanitation. It simply is not, however, the only constitutionally permissible approach to these problems. Certainly, the Due Process Clause does not mandate a "lowest common denominator" security standard, whereby a practice permitted at one penal institution must be permitted at all institutions.

Corrections officials concluded that permitting the introduction of packages of personal property and food would increase the risks of gambling, theft, and inmate fights over that which the institution already experienced by permitting certain items to be purchased from its commissary. "It is enough to say that they have not been conclusively shown to be wrong in this view." *Jones* v. *North Carolina Prisoners' Labor Union,* 433 U. S., at 132. It is also all too obvious that such packages are handy devices for the smuggling of contraband. There simply is no basis in this record for concluding that MCC officials have exaggerated their response to these serious problems or that this restriction is irrational. It does not therefore deprive the convicted inmates or pretrial detainees [35] of the MCC of their property without due process of law in contravention of the Fifth Amendment.

C

The MCC staff conducts unannounced searches of inmate living areas at irregular intervals. These searches generally are formal unit "shakedowns" during which all inmates are cleared of the residential units, and a team of guards searches each room. Prior to the District Court's order, inmates were not permitted to watch the searches. Officials testified that permitting inmates to observe room inspections would lead to friction between the inmates and security guards and would allow the inmates to attempt to frustrate the search by distracting personnel and moving contraband from one room to another ahead of the search team.[36]

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[35] With regard to pretrial detainees, we again note that this restriction affects them for generally a maximum of 60 days. See n. 3, *supra.*

[36] One of the correctional experts testified as follows:

"[T]he requirement that prisoners not be in the immediate area obviously has its basis again in the requirements of security.

"It is quite obvious that if a group of officers start a searching process of a housing area at the MCC, if it be a corridor or an area of rooms or in a

The District Court held that this procedure could not stand as applied to pretrial detainees because MCC officials had not shown that the restriction was justified by "compelling necessity." [37] The court stated that "[a]t least until or unless [petitioners] can show a pattern of violence or other disruptions taxing the powers of control—a kind of showing not remotely approached by the Warden's expressions—the security argument for banishing inmates while their rooms are searched must be rejected." 439 F. Supp., at 149. It also noted that in many instances inmates suspected guards of thievery. *Id.*, at 148–149. The Court of Appeals agreed with the District Court. It saw "no reason whatsoever not to permit a detainee to observe the search of his room and belongings from a reasonable distance," although the court permitted the removal of any detainee who became "obstructive." 573 F. 2d, at 132.

The Court of Appeals did not identify the constitutional provision on which it relied in invalidating the room-search rule. The District Court stated that the rule infringed the detainee's interest in privacy and indicated that this interest in privacy was founded on the Fourth Amendment. 439 F. Supp., at 149–150. It may well be argued that a person confined in a detention facility has no reasonable expectation of privacy with respect to his room or cell and that therefore the Fourth Amendment provides no protection for such a

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typical jail if it were a cell block, unless all prisoners are removed from that immediate area, there are a wide variety of opportunities for the confiscation of contraband by prisoners who may have such in their possession and cells.

"It can go down the toilet or out the window, swallowed, a wide variety of methods of confiscation of contraband." App. 78.

[37] The District Court did not extend its ruling to convicted inmates because, for them, "the asserted necessities need not be 'compelling,'" and since the warden's explanation of the problems posed was "certainly not weightless," the practice passed the constitutional test for sentenced inmates. 439 F. Supp., at 150.

person. Cf. *Lanza* v. *New York*, 370 U. S. 139, 143–144 (1962). In any case, given the realities of institutional confinement, any reasonable expectation of privacy that a detainee retained necessarily would be of a diminished scope. *Id.*, at 143. Assuming, *arguendo*, that a pretrial detainee retains such a diminished expectation of privacy after commitment to a custodial facility, we nonetheless find that the room-search rule does not violate the Fourth Amendment.

It is difficult to see how the detainee's interest in privacy is infringed by the room-search rule. No one can rationally doubt that room searches represent an appropriate security measure and neither the District Court nor the Court of Appeals prohibited such searches. And even the most zealous advocate of prisoners' rights would not suggest that a warrant is required to conduct such a search. Detainees' drawers, beds, and personal items may be searched, even after the lower courts' rulings. Permitting detainees to observe the searches does not lessen the invasion of their privacy; its only conceivable beneficial effect would be to prevent theft or misuse by those conducting the search. The room-search rule simply facilitates the safe and effective performance of the search which all concede may be conducted. The rule itself, then, does not render the searches "unreasonable" within the meaning of the Fourth Amendment.[38]

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[38] It may be that some guards have abused the trust reposed in them by failing to treat the personal possessions of inmates with appropriate respect. But, even assuming that in some instances these abuses of trust reached the level of constitutional violations, this is not an action to recover damages for damage to or destruction of particular items of property. This is a challenge to the room-search rule in its entirety, and the lower courts have enjoined enforcement of the practice itself. When analyzed in this context, proper deference to the informed discretion of prison authorities demands that they, and not the courts, make the difficult judgments which reconcile conflicting claims affecting the security of the institution, the welfare of the prison staff, and the property rights of the detainees. *Jones* v. *North Carolina Prisoners' Labor Union*, 433 U. S., at 128.

D

Inmates at all Bureau of Prisons facilities, including the MCC, are required to expose their body cavities for visual inspection as a part of a strip search conducted after every contact visit with a person from outside the institution.[39] Corrections officials testified that visual cavity searches were necessary not only to discover but also to deter the smuggling of weapons, drugs, and other contraband into the institution. App. 70–72, 83–84. The District Court upheld the strip-search procedure but prohibited the body-cavity searches, absent probable cause to believe that the inmate is concealing contraband. 439 F. Supp., at 147–148. Because petitioners proved only one instance in the MCC's short history where contraband was found during a body-cavity search, the Court of Appeals affirmed. In its view, the "gross violation of personal privacy inherent in such a search cannot be outweighed by the government's security interest in maintaining a practice of so little actual utility." 573 F. 2d, at 131.

Admittedly, this practice instinctively gives us the most pause. However, assuming for present purposes that inmates, both convicted prisoners and pretrial detainees, retain some Fourth Amendment rights upon commitment to a corrections facility, see *Lanza* v. *New York, supra; Stroud* v. *United States,* 251 U. S. 15, 21 (1919), we nonetheless conclude that these searches do not violate that Amendment. The Fourth Amendment prohibits only unreasonable searches, *Carroll* v. *United States,* 267 U. S. 132, 147 (1925), and under the circumstances, we do not believe that these searches are unreasonable.

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[39] If the inmate is a male, he must lift his genitals and bend over to spread his buttocks for visual inspection. The vaginal and anal cavities of female inmates also are visually inspected. The inmate is not touched by security personnel at any time during the *visual* search procedure. 573 F. 2d, at 131; Brief for Petitioners 70, 74 n. 56.

The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted. *E. g., United States* v. *Ramsey,* 431 U. S. 606 (1977); *United States* v. *Martinez-Fuerte,* 428 U. S. 543 (1976); *United States* v. *Brignoni-Ponce,* 422 U. S. 873 (1975); *Terry* v. *Ohio,* 392 U. S. 1 (1968); *Katz* v. *United States,* 389 U. S. 347 (1967); *Schmerber* v. *California,* 384 U. S. 757 (1966). A detention facility is a unique place fraught with serious security dangers. Smuggling of money, drugs, weapons, and other contraband is all too common an occurrence. And inmate attempts to secrete these items into the facility by concealing them in body cavities are documented in this record, App. 71–76, and in other cases. *E. g., Ferraro* v. *United States,* 590 F. 2d 335 (CA6 1978); *United States* v. *Park,* 521 F. 2d 1381, 1382 (CA9 1975). That there has been only one instance where an MCC inmate was discovered attempting to smuggle contraband into the institution on his person may be more a testament to the effectiveness of this search technique as a deterrent than to any lack of interest on the part of the inmates to secrete and import such items when the opportunity arises.[40]

[40] The District Court indicated that in its view the use of metal detection equipment represented a less intrusive and equally effective alternative to cavity inspections. We noted in *United States* v. *Martinez-Fuerte,* 428 U. S. 543, 556–557, n. 12 (1976), that "[t]he logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers." However, assuming that the existence of less intrusive alternatives is relevant to the determination of the reasonableness of the particular search method at issue, the alternative suggested by the District Court simply would not be as effective as the visual inspection procedure. Money, drugs, and other non-

We do not underestimate the degree to which these searches may invade the personal privacy of inmates. Nor do we doubt, as the District Court noted, that on occasion a security guard may conduct the search in an abusive fashion. 439 F. Supp., at 147. Such abuse cannot be condoned. The searches must be conducted in a reasonable manner. *Schmerber* v. *California, supra,* at 771–772. But we deal here with the question whether visual body-cavity inspections as contemplated by the MCC rules can *ever* be conducted on less than probable cause. Balancing the significant and legitimate security interests of the institution against the privacy interests of the inmates, we conclude that they can.[41]

## IV

Nor do we think that the four MCC security restrictions and practices described in Part III, *supra,* constitute "punish-

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metallic contraband still could easily be smuggled into the institution. Another possible alternative, not mentioned by the lower courts, would be to closely observe inmate visits. See Dept. of Justice, Federal Corrections Policy Task Force, Federal Standards for Corrections (Draft, June 1978). But MCC officials have adopted the visual inspection procedure as an alternative to close and constant monitoring of contact visits to avoid the obvious disruption of the confidentiality and intimacy that these visits are intended to afford. That choice has not been shown to be irrational or unreasonable. Another alternative that might obviate the need for body-cavity inspections would be to abolish contact visits altogether. But the Court of Appeals, in a ruling that is not challenged in this Court and on which we, accordingly, express no opinion, held that pretrial detainees have a constitutional right to contact visits. 573 F. 2d, at 126 n. 16; see *Marcera* v. *Chinlund,* 595 F. 2d 1231 (CA2 1979). See also *Miller* v. *Carson,* 563 F. 2d, at 748–749.

[41] We note that several lower courts have upheld such visual body-cavity inspections against constitutional challenge. See, *e. g., Daughtery* v. *Harris,* 476 F. 2d 292 (CA10), cert. denied, 414 U. S. 872 (1973); *Hodges* v. *Klein,* 412 F. Supp. 896 (NJ 1976); *Bijeol* v. *Benson,* 404 F. Supp. 595 (SD Ind. 1975); *Penn El* v. *Riddle,* 399 F. Supp. 1059 (ED Va. 1975).

ment" in violation of the rights of pretrial detainees under the Due Process Clause of the Fifth Amendment.[42] Neither the District Court nor the Court of Appeals suggested that these restrictions and practices were employed by MCC officials with an intent to punish the pretrial detainees housed there.[43] Respondents do not even make such a suggestion; they simply argue that the restrictions were greater than necessary to satisfy petitioners' legitimate interest in maintaining security. Brief for Respondents 51–53. Therefore, the determination whether these restrictions and practices constitute punishment in the constitutional sense depends on whether they are rationally related to a legitimate nonpunitive governmental purpose and whether they appear excessive in relation to that purpose. See *supra*, at 538–539. Ensuring security and order at the institution is a permissible nonpunitive objective, whether the facility houses pretrial detainees, convicted inmates, or both. *Supra*, at 539–540; see *supra*, at 546–547, and n. 28. For the reasons set forth in Part III, *supra*, we think that these particular restrictions and practices were reasonable responses by MCC officials to legitimate security concerns. Respondents simply have not met their heavy

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[42] In determining whether the "publisher-only" rule constitutes punishment, we consider the rule in its present form and in light of the concessions made by petitioners. See *supra*, at 548–550.

[43] The District Court noted that in their post-trial memorandum petitioners stated that "[w]ith respect to sentenced inmates, . . . the restrictions on the possession of personal property also serve the legitimate purpose of punishment." 439 F. Supp., at 153; see Post-trial Memorandom for Respondents in No. 75 Civ. 6000 (SDNY) 212 n. However, below and in this Court, petitioners have relied only on the three reasons discussed *supra*, at 553, to justify this restriction. In our view, this passing reference in a brief to sentenced inmates, which was not supported by citation to the record, hardly amounts to the "substantial confession of error" with respect to pretrial detainees referred to by the District Court. 439 F. Supp., at 153.

burden of showing that these officials have exaggerated their response to the genuine security considerations that actuated these restrictions and practices. See n. 23, *supra*. And as might be expected of restrictions applicable to pretrial detainees, these restrictions were of only limited duration so far as the MCC pretrial detainees were concerned. See n. 3, *supra*.

## V

There was a time not too long ago when the federal judiciary took a completely "hands-off" approach to the problem of prison administration. In recent years, however, these courts largely have discarded this "hands-off" attitude and have waded into this complex arena. The deplorable conditions and Draconian restrictions of some of our Nation's prisons are too well known to require recounting here, and the federal courts rightly have condemned these sordid aspects of our prison systems. But many of these same courts have, in the name of the Constitution, become increasingly enmeshed in the minutiae of prison operations. Judges, after all, are human. They, no less than others in our society, have a natural tendency to believe that their individual solutions to often intractable problems are better and more workable than those of the persons who are actually charged with and trained in the running of the particular institution under examination. But under the Constitution, the first question to be answered is not whose plan is best, but in what branch of the Government is lodged the authority to initially devise the plan. This does not mean that constitutional rights are not to be scrupulously observed. It does mean, however, that the inquiry of federal courts into prison management must be limited to the issue of whether a particular system violates any prohibition of the Constitution or, in the case of a federal prison, a statute. The wide range of "judgment calls" that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government.

The judgment of the Court of Appeals is, accordingly, reversed, and the case is remanded for proceedings consistent with this opinion.

*It is so ordered.*

MR. JUSTICE POWELL, concurring in part and dissenting in part.

I join the opinion of the Court except the discussion and holding with respect to body-cavity searches. In view of the serious intrusion on one's privacy occasioned by such a search, I think at least some level of cause, such as a reasonable suspicion, should be required to justify the anal and genital searches described in this case. I therefore dissent on this issue.

MR. JUSTICE MARSHALL, dissenting.

The Court holds that the Government may burden pretrial detainees with almost any restriction, provided detention officials do not proclaim a punitive intent or impose conditions that are "arbitrary or purposeless." *Ante,* at 539. As if this standard were not sufficiently ineffectual, the Court dilutes it further by according virtually unlimited deference to detention officials' justifications for particular impositions. Conspicuously lacking from this analysis is any meaningful consideration of the most relevant factor, the impact that restrictions may have on inmates. Such an approach is unsupportable, given that all of these detainees are presumptively innocent and many are confined solely because they cannot afford bail.[1]

[1] The Bail Reform Act, 18 U. S. C. § 3146, to which the Court adverts *ante,* at 524, provides that bail be set in an amount that will "reasonably assure" the defendant's presence at trial. In fact, studies indicate that bail determinations frequently do not focus on the individual defendant but only on the nature of the crime charged and that, as administered, the system penalizes indigent defendants. See, *e. g.,* ABA Project on Standards for Criminal Justice, Pretrial Release 1–2 (1968); W. Thomas,

In my view, the Court's holding departs from the precedent it purports to follow and precludes effective judicial review of the conditions of pretrial confinement. More fundamentally, I believe the proper inquiry in this context is not whether a particular restraint can be labeled "punishment." Rather, as with other due process challenges, the inquiry should be whether the governmental interests served by any given restriction outweigh the individual deprivations suffered.

I

The premise of the Court's anlaysis is that detainees, unlike prisoners, may not be "punished." To determine when a particular disability imposed during pretrial detention is punishment, the Court invokes the factors enunciated in *Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144, 168–169 (1963), quoted *ante,* at 537–538 (footnotes omitted):

> "Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter,* whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions."

A number of the factors enunciated above focus on the nature and severity of the impositions at issue. Thus, if weight were given to all its elements, I believe the *Mendoza-Martinez* inquiry could be responsive to the impact of the

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Bail Reform in America 11–19 (1976). See also National Advisory Commission on Criminal Justice Standards and Goals, Corrections 102–103 (1973); National Association of Pretrial Service Agencies, Performance Standards and Goals for Pretrial Release and Diversion 1–3 (1978).

deprivations imposed on detainees. However, within a few lines after quoting *Mendoza-Martinez*, the Court restates the standard as whether there is an expressed punitive intent on the part of detention officials, and, if not, whether the restriction is rationally related to some nonpunitive purpose or appears excessive in relation to that purpose. *Ante*, at 538–539. Absent from the reformulation is any appraisal of whether the sanction constitutes an affirmative disability or restraint and whether it has historically been regarded as punishment. Moreover, when the Court applies this standard, it loses interest in the inquiry concerning excessiveness, and, indeed, eschews consideration of less restrictive alternatives, practices in other detention facilities, and the recommendations of the Justice Department and professional organizations. See *ante*, at 542–543, n. 25, 543–544, n. 27, 554. By this process of elimination, the Court contracts a broad standard, sensitive to the deprivations imposed on detainees, into one that seeks merely to sanitize official motives and prohibit irrational behavior. As thus reformulated, the test lacks any real content.

A

To make detention officials' intent the critical factor in assessing the constitutionality of impositions on detainees is unrealistic in the extreme. The cases on which the Court relies to justify this narrow focus all involve legislative Acts, not day-to-day administrative decisions. See *Kennedy* v. *Mendoza-Martinez*, *supra* (Nationality Act of 1940 and Immigration and Nationality Act of 1952); *Flemming* v. *Nestor*, 363 U. S. 603 (1960) (Social Security Act); *De Veau* v. *Braisted*, 363 U. S. 144 (1960) (New York Waterfront Commission Act). In discerning the intent behind a statutory enactment, courts engage in a familiar judicial function, usually with the benefit of a legislative history that preceded passage of the statute. The motivation for policies in detention facilities, however, will frequently not be a matter of pub-

lic record. Detainees challenging these policies will therefore bear the substantial burden of establishing punitive intent on the basis of circumstantial evidence or retrospective explanations by detention officials, which frequently may be self-serving. Particularly since the Court seems unwilling to look behind any justification based on security,[2] that burden will usually prove insurmountable.

In any event, it will often be the case that officials believe, erroneously but in good faith, that a specific restriction is necessary for institutional security. As the District Court noted, "zeal for security is among the most common varieties of official excess," *United States ex rel. Wolfish* v. *Levi*, 439 F. Supp. 114, 141 (SDNY 1977), and the litigation in this area corroborates that conclusion.[3] A standard that focuses

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[2] Indeed, the Court glosses over the Government's statement in its post-trial memorandum that for inmates serving sentences, "the restrictions on the possession of personal property also serve the legitimate purpose of punishment." *United States ex rel. Wolfish* v. *Levi*, 439 F. Supp. 114, 153 (SDNY 1977); Post-trial Memorandum for Respondents in No. 75 Civ. 6000 (SDNY) 212 n., quoted *ante*, at 561 n. 43. This statement provides at least some indication that a similar motive may underlie application of the same rules to detainees. The Court's treatment of this point illustrates the indifference with which it pursues the intent inquiry.

[3] Thus, for example, lower courts have held a variety of security restrictions unconstitutional. *E. g.*, *Collins* v. *Schoonfield*, 344 F. Supp. 257, 283 (Md. 1972) (warden censored newspaper articles critical of his administration of jail); *id.*, at 278 (mentally disturbed detainees shackled in jail infirmary); *Inmates of Milwaukee County Jail* v. *Petersen*, 353 F. Supp. 1157, 1164 (ED Wis. 1973) (detainees limited to two pages per letter; notice to relatives and friends of the time and place of detainee's next court appearance deleted on security grounds); *United States ex rel. Manicone* v. *Corso*, 365 F. Supp. 576 (EDNY 1973) (newspapers banned because they might disrupt prisoners and create a fire hazard); *Miller* v. *Carson*, 401 F. Supp. 835, 878 (MD Fla. 1975), aff'd, 563 F. 2d 741 (CA5 1977) (detainees in hospital kept continuously chained to bed); *O'Bryan* v. *County of Saginaw*, 437 F. Supp. 582 (ED Mich. 1977) (detainees with bail of more than $500 prevented from attending religious services); *Vest* v. *Lubbock County Commissioners Court*, 444 F. Supp. 824 (ND Tex.

on punitive intent cannot effectively eliminate this excess. Indeed, the Court does not even attempt to "detail the precise extent of the legitimate governmental interests that may justify conditions or restrictions of pretrial detention." *Ante,* at 540. Rather, it is content merely to recognize that "the effective management of the detention facility . . . is a valid objective that may justify imposition of conditions and restrictions of pretrial detention and dispel any inference that such restrictions are intended as punishment." *Ibid.*

Moreover, even if the inquiry the Court pursues were more productive, it simply is not the one the Constitution mandates here. By its terms, the Due Process Clause focuses on the nature of deprivations, not on the persons inflicting them. If this concern is to be vindicated, it is the effect of conditions of confinement, not the intent behind them, that must be the focal point of constitutional analysis.

B

Although the Court professes to go beyond the direct inquiry regarding intent and to determine whether a particular imposition is rationally related to a nonpunitive purpose, this exercise is at best a formality. Almost any restriction on detainees, including, as the Court concedes, chains and shackles, *ante,* at 539 n. 20, can be found to have some rational relation to institutional security, or more broadly, to "the effective management of the detention facility." *Ante,* at 540. See *Feeley* v. *Sampson,* 570 F. 2d 364, 380 (CA1 1977) (Coffin, C. J., dissenting). Yet this toothless standard applies irrespective of the excessiveness of the restraint or the nature of the rights infringed.[4]

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1977) (detainees limited to three pages per letter and six incoming and outgoing letters per week to facilitate censorship; guards authorized to refuse to mail or deliver letters containing "abusive" language).

[4] The Court does concede that "loading a detainee with chains and shackles and throwing him in a dungeon," *ante,* at 539 n. 20, would create

Moreover, the Court has not in fact reviewed the rationality of detention officials' decisions, as *Mendoza-Martinez* requires. Instead, the majority affords "wide-ranging" deference to those officials "in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Ante*, at 547.[5] Reasoning that security considerations in jails are little different than in prisons, the Court concludes that cases requiring substantial deference to *prison* administrators' determinations on security-related issues are equally applicable in the present context. *Ante*, at 546–547, nn. 28, 29.

Yet as the Court implicitly acknowledges, *ante*, at 545, the rights of detainees, who have not been adjudicated guilty of a crime, are necessarily more extensive than those of prisoners "who have been found to have violated one or more of the criminal laws established by society for its orderly governance." *Jones* v. *North Carolina Prisoners' Union*, 433 U. S. 119, 129 (1977). See *Campbell* v. *McGruder*, 188 U. S. App. D. C. 258, 264 n. 9, 580 F. 2d 521, 527 n. 9 (1978). Judicial tolerance of substantial impositions on detainees must be concomitantly less. However, by blindly deferring to administrative judgments on the rational basis for particular restrictions, the Court effectively delegates to detention officials the decision whether pretrial detainees have been punished. This, in my view, is an abdication of an unquestionably judicial function.

## II

Even had the Court properly applied the punishment test, I could not agree to its use in this context. It simply does

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an inference of punitive intent and hence would be impermissible. I am indeed heartened by this concession, but I do not think it sufficient to give force to the Court's standard.

[5] Indeed, lest the point escape the reader, the majority reiterates it 12 times in the course of the opinion. *Ante*, at 531, 540–541, n. 23, 544, 546–548, and nn. 29 and 30, 551, 554, 557 n. 38, 562.

not advance analysis to determine whether a given deprivation imposed on detainees constitutes "punishment." For in terms of the nature of the imposition and the impact on detainees, pretrial incarceration, although necessary to secure defendants' presence at trial, is essentially indistinguishable from punishment.[6] The detainee is involuntarily confined and deprived of the freedom "to be with his family and friends and to form the other enduring attachments of normal life," *Morrissey* v. *Brewer*, 408 U. S. 471, 482 (1972). Indeed, this Court has previously recognized that incarceration is an "infamous punishment." *Flemming* v. *Nestor*, 363 U. S., at 617; see also *Wong Wing* v. *United States*, 163 U. S. 228, 233–234 (1896); *Ingraham* v. *Wright*, 430 U. S. 651, 669 (1977). And if the effect of incarceration itself is inevitably punitive, so too must be the cumulative impact of those restraints incident to that restraint.[7]

A test that balances the deprivations involved against the state interests assertedly served [8] would be more consistent

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[6] As Chief Judge Coffin has stated, "[i]t would be impossible, without playing fast and loose with the English language, for a court to examine the conditions of confinement under which detainees are incarcerated . . . and conclude that their custody was not punitive in effect if not in intent." *Feeley* v. *Sampson*, 570 F. 2d 364, 380 (CA1 1978) (dissenting opinion). Accord, *Campbell* v. *McGruder*, 188 U. S. App. D. C. 258, 267, 580 F. 2d 521, 530 (1978).

[7] If a particular imposition could be termed "punishment" under the *Mendoza-Martinez* criteria, I would, of course, agree that it violates the Due Process Clause. My criticism is that, in this context, determining whether a given restraint constitutes punishment is an empty semantic exercise. For pretrial incarceration is in many respects no different from the sanctions society imposes on convicted criminals. To argue over a question of characterization can only obscure what is in fact the appropriate inquiry, the actual nature of the impositions balanced against the Government's justifications.

[8] See *New Motor Vehicle Board* v. *Orrin W. Fox Co.*, 439 U. S. 96, 112–113 (1978) (MARSHALL, J., concurring); *Poe* v. *Ullman*, 367 U. S. 497, 542 (1961) (Harlan, J., dissenting); *Moore* v. *East Cleveland*, 431 U. S. 494, 499 (1977); *Roe* v. *Wade*, 410 U. S. 113, 115 (1973).

with the import of the Due Process Clause. Such an approach would be sensitive to the tangible physical and psychological harm that a particular disability inflicts on detainees and to the nature of the less tangible, but significant, individual interests at stake. The greater the imposition on detainees, the heavier the burden of justification the Government would bear. See *Bates* v. *Little Rock*, 361 U. S. 516, 524 (1960); *Shapiro* v. *Thompson*, 394 U. S. 618, 634 (1969); *Kusper* v. *Pontikes*, 414 U. S. 51, 58–59 (1973).

When assessing the restrictions on detainees, we must consider the cumulative impact of restraints imposed during confinement. Incarceration of itself clearly represents a profound infringement of liberty, and each additional imposition increases the severity of that initial deprivation. Since any restraint thus has a serious effect on detainees, I believe the Government must bear a more rigorous burden of justification than the rational-basis standard mandates. See *supra*, at 567. At a minimum, I would require a showing that a restriction is substantially necessary to jail administration. Where the imposition is of particular gravity, that is, where it implicates interests of fundamental importance[9] or inflicts significant harms, the Government should demonstrate that the restriction serves a compelling necessity of jail administration.[10]

In presenting its justifications, the Government could adduce evidence of the security and administrative needs of

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[9] See, *e. g.*, *Brandenburg* v. *Ohio*, 395 U. S. 444, 448 (1969) (free speech); *Bounds* v. *Smith*, 430 U. S. 817 (1977) (access to the courts).

[10] Blackstone observed over 200 years ago:

"Upon the whole, if the offence be not bailable, or the party cannot find bail, he is to be committed to the county gaol by the *mittimus* of the justice . . . ; there to abide till delivered by due course of law. . . . But this imprisonment, as has been said, is only for safe custody, and not for punishment: therefore, in his dubious interval between the commitment and trial, a prisoner ought to be used with the utmost humanity; and neither be loaded with needless fetters, or subjected to other hardships than such as are absolutely requisite for the purpose of confinement only . . . ." 4 W. Blackstone, Commentaries *300.

the institution as well as the fiscal constraints under which it operates. And, of course, considerations of competence and comity require some measure of deference to the judgments of detention officials. Their estimation of institutional needs and the administrative consequences of particular acts is entitled to weight. But as the Court has repeatedly held in the prison context, judicial restraint "cannot encompass any failure to take cognizance of valid constitutional claims." *Procunier* v. *Martinez*, 416 U. S. 396, 405 (1974); *Bounds* v. *Smith*, 430 U. S. 817, 832 (1977). Even more so here, with the rights of presumptively innocent individuals at stake, we cannot abdicate our judicial responsibility to evaluate independently the Government's asserted justifications for particular deprivations. In undertaking this evaluation, courts should thus examine evidence of practices in other detention and penal facilities. To be sure, conditions of detention should not survive constitutional challenge merely because they are no worse than circumstances in prisons. But this evidence can assist courts in evaluating justifications based on security, administrative convenience, and fiscal constraints.

Simply stated, the approach I advocate here weighs the detainees' interests implicated by a particular restriction against the governmental interests the restriction serves. As the substantiality of the intrusion on detainees' rights increases, so must the significance of the countervailing governmental objectives.

## III

### A

Applying this standard to the facts of this case, I believe a remand is necessary on the issue of double-bunking at the MCC. The courts below determined only whether double-bunking was justified by a compelling necessity, excluding fiscal and administrative considerations. Since it was readily ascertainable that the Government could not prevail under that test, detailed inquiry was unnecessary. Thus, the Dis-

trict Court granted summary judgment, without a full record on the psychological and physical harms caused by overcrowding.[11] To conclude, as the Court does here, that double-bunking has not inflicted "genuine privations and hardship over an extended period of time," *ante,* at 542, is inappropriate where respondents have not had an adequate opportunity to produce evidence suggesting otherwise. Moreover, that the District Court discerned no disputed issues of material fact, see *ante,* at 541 n. 24, is no justification for avoiding a remand, since what is material necessarily varies with the standard applied. Rather than pronouncing overbroad aphorisms about the principles "lurking in the Due Process Clause," *ante,* at 542, I would leave to the District Court in the first instance the sensitive balancing inquiry that the Due Process Clause dictates.[12]

B

Although the constitutionality of the MCC's rule limiting the sources of hardback books was also decided on summary judgment, I believe a remand is unnecessary.[13] That

[11] Other courts have found that in the circumstances before them overcrowding inflicted mental and physical damage on inmates. See, *e. g., Detainees of Brooklyn House of Detention* v. *Malcolm,* 520 F. 2d 392, 396, and n. 4 (CA2 1975) (testimony of correctional experts that double-bunking is "psychologically destructive and increases homosexual impulses, tensions and aggressive tendencies"); *Battle* v. *Anderson,* 564 F. 2d 388, 398 (CA10 1977); *Campbell* v. *McGruder,* 188 U. S. App. D. C., at 273, 580 F. 2d, at 536 (overcrowding likely "to impair the mental and physical health" of detainees); *Chapman* v. *Rhodes,* 434 F. Supp. 1007, 1020 (SD Ohio 1977).

[12] The MCC has a single-bed capacity of 449 inmates. Under the Court's analysis, what is to be done if the inmate population grows suddently to 600, or 900? The Court simply ignores the rated capacity of the institution. Yet this figure is surely relevant in assessing whether overcrowding inflicts harms of constitutional magnitude.

[13] The Court of Appeals' rulings on what this Court broadly designates "security restrictions" applied both to detainees and convicted prisoners. I believe impositions on these groups must be measured under different standards. See *supra,* at 568–571. I would remand to the District Court

individuals have a fundamental First Amendment right to receive information and ideas is beyond dispute. See *Martin* v. *Struthers*, 319 U. S. 141, 143 (1943); *Stanley* v. *Georgia*, 394 U. S. 557, 565 (1969); *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 390 (1969); see also *Brandenburg* v. *Ohio*, 395 U. S. 444, 448 (1969). Under the balancing test elaborated above, the Government must therefore demonstrate that its rule infringing on that interest serves a compelling necessity. As the courts below found, the Government failed to make such a showing.[14]

In support of its restriction, the Government presented the affidavit of the MCC warden, who averred without elaboration that a proper and thorough search of incoming hardback books might require removal of the covers. Further, the warden asserted, "in the case of all books and magazines," it would

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for a determination whether there is a continuing controversy with respect to convicted inmates. If the issues were contested, the body-cavity searches, at the least, would presumably be invalid. Cf. *infra*, at 576–578, and *United States* v. *Lilly*, 576 F. 2d 1240 (CA5 1978).

[14] Nor can the Court's attempt to denominate the publisher-only rule as a reasonable "time, place and manner regulatio[n]," *ante*, at 552, substitute for such a showing. In each of the cases cited by the Court for this proposition, the private individuals had the ability to alter the time, place, or manner of exercising their First Amendment rights. *Grayned* v. *City of Rockford*, 408 U. S. 104 (1972) (ordinance prohibiting demonstration within 150 feet of a school at certain times of the day); *Cox* v. *New Hampshire*, 312 U. S. 569 (1941) (permissible to require license for parade); *Cox* v. *Louisiana*, 379 U. S. 536, 554–555 (1965) (city could prohibit parades during rush hour); *Adderley* v. *Florida*, 385 U. S. 39 (1966) (public demonstration on premises of county jail). It is not clear that the detainees here possess the same freedom to alter the time, place, or manner of exercising their First Amendment rights. Indeed, as the Government acknowledges, Tr. of Oral Arg. 18, an unspecified number of detainees at the MCC are incarcerated because they cannot afford bail. For these persons, the option of purchasing hardback books from publishers or bookstores will frequently be unavailable. And it is hardly consistent with established First Amendment precepts to restrict inmates to library selections made by detention officials.

be necessary to leaf through every page to ascertain that there was no contraband. App. 24. The warden offered no reasons why the institution could not place reasonable limitations on the number of books inmates could receive or use electronic devices and fluoroscopes to detect contraband rather than requiring inmates to purchase hardback books directly from publishers or stores.[15] As the Court of Appeals noted, "other institutions have not recorded untoward experiences with far less restrictive rules." *Wolfish* v. *Levi,* 573 F. 2d 118, 130 (1978).

The limitation on receipt of hardback books may well be *one* rational response to the legitimate security concerns of the institution, concerns which I in no way intend to deprecate. But our precedents, as the courts below apparently recognized, *United States ex rel. Wolfish* v. *United States,* 428 F. Supp. 333, 341 (SDNY 1977); 573 F. 2d, at 130, require some consideration of less restrictive alternatives, see, *e. g., Shelton* v. *Tucker,* 364 U. S. 479, 488–490 (1960); *Keyishian* v. *Board of Regents,* 385 U. S. 589, 602–604 (1967). There is no basis for relaxing this requirement when the rights of presumptively innocent detainees are implicated.

C

The District Court did conduct a trial on the constitutionality of the MCC package rule and room-search practices. Although the courts below applied a different standard, the record is sufficient to permit resolution of these issues here. And since this Court decides the questions, I think it appropriate to suggest the results that would obtain on this record under my standard.

Denial of the right to possess property is surely of heightened concern when viewed with the other indignities of detainment. See App. 73. As the District Court observed, it is a

[15] The MCC already uses such electronic equipment to search packages carried by visitors. See *infra,* at 578.

severe discomfort to do without personal items such as a watch or cosmetics, and things to eat, smoke, or chew. Indeed, the court noted, "[t]he strong dependence upon material things . . . gives rise to one of the deepest miseries of incarceration—the deprivation of familiar possessions." 439 F. Supp., at 150. Given this impact on detainees, the appropriate inquiry is whether the package restriction is substantially necessary to prison administration.

The Government's justification for such a broad rule cannot meet this burden. The asserted interest in ameliorating sanitation and storage problems and avoiding thefts, gambling, and inmate conflicts over personal property is belied, as the Court seems to recognize, *ante,* at 553, by the policy of permitting inmate purchases of up to $15 a week from the prison commissary. Detention officials doubtless have a legitimate interest in preventing introduction of drugs or weapons into the facility. But as both the District Court and the Court of Appeals observed, other detention institutions have adopted much less restrictive regulations than the MCC's governing receipt of packages. See, *e. g., Miller* v. *Carson,* 401 F. Supp. 835, 885 (MD Fla. 1975), aff'd, 563 F. 2d 741 (CA5 1977); *Giampetruzzi* v. *Malcolm,* 406 F. Supp. 836, 842 (SDNY 1975). Inmates in New York state institutions, for example, may receive a 35-pound package each month, as well as clothing and magazines. See 439 F. Supp., at 152.[16]

To be sure, practices in other institutions do not necessarily demarcate the constitutional minimum. See *ante,* at 554. But such evidence does cast doubt upon the Government's justifications based on institutional security and administrative convenience. The District Court held that the Government was obligated to dispel these doubts. The court thus

[16] In addition, the Justice Department's Draft Federal Standards for Corrections discourage limitations on the volume or content of inmate mail, including packages. Dept. of Justice, Federal Corrections Policy Task Force, Federal Standards for Corrections 63 (Draft, June 1978).

required a reasoned showing why "there must be deprivations at the MCC so much harsher than deemed necessary in other institutions." 439 F. Supp., at 152. Absent such a showing, the court concluded that the MCC's rule swept too broadly and ordered detention officials to formulate a suitable alternative, at least with respect to items available from the commissary. *Id.*, at 153. This holding seems an appropriate accommodation of the competing interests and a minimal intrusion on administrative prerogatives.

I would also affirm the ruling of the courts below that inmates must be permitted to observe searches of their cells. Routine searches such as those at issue here may be an unavoidable incident of incarceration. Nonetheless, the protections of the Fourth Amendment do not lapse at the jailhouse door, *Bonner* v. *Coughlin,* 517 F. 2d 1311, 1316–1317 (CA7 1975) (Stevens, J.); *United States* v. *Lilly,* 576 F. 2d 1240, 1244–1245 (CA5 1978). Detention officials must therefore conduct such searches in a reasonable manner, avoiding needless intrusions on inmates' privacy. Because unobserved searches may invite official disrespect for detainees' few possessions and generate fears that guards will steal personal property or plant contraband, see 439 F. Supp., at 148–149, the inmates' interests are significant.

The Government argues that allowing detainees to observe official searches would lead to violent confrontations and enable inmates to remove or conceal contraband. However, the District Court found that the Government had not substantiated these security concerns and that there were less intrusive means available to accomplish the institution's objectives. *Ibid.* Thus, this record does not establish that unobserved searches are substantially necessary to jail administration.

D

In my view, the body-cavity searches of MCC inmates represent one of the most grievous offenses against personal

dignity and common decency. After every contact visit with someone from outside the facility, including defense attorneys, an inmate must remove all of his or her clothing, bend over, spread the buttocks, and display the anal cavity for inspection by a correctional officer. Women inmates must assume a suitable posture for vaginal inspection, while men must raise their genitals. And, as the Court neglects to note, because of time pressures, this humiliating spectacle is frequently conducted in the presence of other inmates. App. 77.

The District Court found that the stripping was "unpleasant, embarrassing, and humiliating." 439 F. Supp., at 146. A psychiatrist testified that the practice placed inmates in the most degrading position possible, App. 48, a conclusion amply corroborated by the testimony of the inmates themselves. *Id.*, at 36–37, 41.[17] There was evidence, moreover, that these searches engendered among detainees fears of sexual assault, *id.*, at 49, were the occasion for actual threats of physical abuse by guards, and caused some inmates to forgo personal visits. 439 F. Supp., at 147.

Not surprisingly, the Government asserts a security justification for such inspections. These searches are necessary, it argues, to prevent inmates from smuggling contraband into the facility. In crediting this justification despite the contrary findings of the two courts below, the Court overlooks the critical facts. As respondents point out, inmates are required to wear one-piece jumpsuits with zippers in the front. To insert an object into the vaginal or anal cavity, an inmate would have to remove the jumpsuit, at least from the upper torso. App. 45; Joint App. in Nos. 77–2035, 77–2135 (CA2),

[17] While the Government presented psychiatric testimony that the procedures were not likely to create lasting emotional trauma, the District Court intimated some doubt as to the credibility of this testimony, and found that the injury was of constitutional dimension even if it did not require psychiatric treatment or leave permanent psychological scars. 439 F. Supp., at 150.

p. 925 (hereinafter Joint App.). Since contact visits occur in a glass-enclosed room and are continuously monitored by corrections officers, see 439 F. Supp., at 140, 147; Joint App. 144, 1208–1209,[18] such a feat would seem extraordinarily difficult. There was medical testimony, moreover, that inserting an object into the rectum is painful and "would require time and opportunity which is not available in the visiting areas," App. 49–50, and that visual inspection would probably not detect an object once inserted. *Id.*, at 50. Additionally, before entering the visiting room, visitors and their packages are searched thoroughly by a metal detector, fluoroscope, and by hand. *Id.*, at 93; Joint App. 601, 1077. Correction officers may require that visitors leave packages or handbags with guards until the visit is over. Joint App. 1077–1078. Only by blinding itself to the facts presented on this record can the Court accept the Government's security rationale.

Without question, these searches are an imposition of sufficient gravity to invoke the compelling-necessity standard. It is equally indisputable that they cannot meet that standard. Indeed, the procedure is so unnecessarily degrading that it "shocks the conscience." *Rochin* v. *California*, 342 U. S. 165, 172 (1952). Even in *Rochin*, the police had reason to believe that the petitioner had swallowed contraband. Here, the searches are employed absent any suspicion of wrongdoing. It was this aspect of the MCC practice that the Court of Appeals redressed, requiring that searches be conducted only when there is probable cause to believe that the inmate is concealing contraband. The Due Process Clause, on any principled reading, dictates no less.

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[18] To facilitate this monitoring, MCC officials limited to 25 the number of people in the visiting room at one time. Joint App. 1208. Inmates were forbidden to use the locked lavatories, and visitors could use them only by requesting a key from a correctional officer. App. 93; see *Wolfish* v. *Levi*, 573 F. 2d 118, 125 (1978). The lavatories, as well, contain a built-in window for observation. Brief for Respondents 57.

That the Court can uphold these indiscriminate searches highlights the bankruptcy of its basic analysis. Under the test adopted today, the rights of detainees apparently extend only so far as detention officials decide that cost and security will permit. Such unthinking deference to administrative convenience cannot be justified where the interests at stake are those of presumptively innocent individuals, many of whose only proven offense is the inability to afford bail. I dissent.

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN joins, dissenting.

This is not an equal protection case.[1] An empirical judgment that most persons formally accused of criminal conduct are probably guilty would provide a rational basis for a set of rules that treat them like convicts until they establish their innocence. No matter how rational such an approach might be—no matter how acceptable in a community where equality of status is the dominant goal—it is obnoxious to the concept of individual freedom protected by the Due Process Clause. If ever accepted in this country, it would work a fundamental change in the character of our free society.

Nor is this an Eighth Amendment case.[2] That provision of the Constitution protects individuals convicted of crimes from punishment that is cruel and unusual. The pretrial detainees whose rights are at stake in this case, however, are innocent men and women who have been convicted of no crimes. Their claim is not that they have been subjected to cruel and unusual punishment in violation of the Eighth Amendment, but that to subject them to any form of punishment at all is an unconstitutional deprivation of their liberty.

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[1] "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., Amdt. 14, § 1.

[2] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U. S. Const., Amdt. 8.

This is a due process case.[3] The most significant—and I venture to suggest the most enduring—part of the Court's opinion today is its recognition of this initial constitutional premise. The Court squarely holds that "under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law."[4] *Ante,* at 535.

This right to be free of punishment is not expressly embodied in any provision in the Bill of Rights. Nor is the source of this right found in any statute. The source of this fundamental freedom is the word "liberty" itself as used in the Due Process Clause, and as informed by "history, reason, the past course of decisions," and the judgment and experience of "those whom the Constitution entrusted" with interpreting that word. *Anti-Fascist Committee* v. *McGrath,* 341 U. S. 123, 162–163 (Frankfurter, J., concurring). See *Leis* v. *Flynt,* 439 U. S. 438, 457 (STEVENS, J., dissenting).

In my opinion, this latter proposition is obvious and indisputable.[5] Nonetheless, it is worthy of emphasis because the Court has now accepted it in principle. *Ante,* at 535. In recent years, the Court has mistakenly implied that the concept of liberty encompasses only those rights that are either created by statute or regulation or are protected by an express provision of the Bill of Rights.[6] Today, however, without the help of any statute, regulation, or express provision of the Constitution, the Court has derived the innocent person's right not to be punished from the Due Process Clause itself. It has accordingly abandoned its parsimonious definition of

[3] Because this is a federal facility, it is, of course, the Fifth Amendment that applies. It provides, in relevant part: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

[4] Because MR. JUSTICE MARSHALL does not accept this basis for analysis, see *ante,* at 568–569, I have added this separate dissent even though I agree with much of his analysis and most of his criticism of the Court.

[5] See *Meachum* v. *Fano,* 427 U. S. 215, 230 (STEVENS, J., dissenting).

[6] See *Leis* v. *Flynt,* 439 U. S. 438, 443; *Paul* v. *Davis,* 424 U. S. 693.

the "liberty" protected by the majestic words of the Clause. I concur in that abandonment. It is with regard to the scope of this fundamental right that we part company.

## I

Some of the individuals housed in the Metropolitan Correction Center (MCC) are convicted criminals.[7] As to them, detention may legitimately serve a punitive goal, and there is strong reason, even apart from the rules challenged here, to suggest that it does.[8] But the same is not true of the detainees who are also housed there and whose rights we are called upon to address. Notwithstanding the impression created by the Court's opinion, see, *e. g., ante,* at 562, these people are not "prisoners": [9] they have not been convicted of any crimes, and their detention may serve only a more limited, regulatory purpose.[10] See *Houchins* v. *KQED, Inc.,* 438 U. S. 1, 37–38 (STEVENS, J., dissenting).

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[7] The facility is used to house convicted persons who are temporarily in New York for court appearances and the like, as well as some who are confined there for the duration of short sentences.

[8] There is neither time, staff, nor opportunity to offer convicted inmates at MCC the kind of training or treatment that is sometimes available in a prison environment.

[9] See Webster's Third International Dictionary 1804 (1961) (As *"often"* used, a "prison" is "an institution for the imprisonment of persons convicted of major crimes or felonies: a penitentiary as distinguished from a reformatory, local jail, or detention home").

[10] Long-term incarceration and other postconviction sanctions have significant backward-looking, personal, and normative components. Because they are primarily designed to inflict pain or to "correct" the individual because of some past misdeed, the sanctions are considered punitive. See E. Pincoffs, The Rationale of Legal Punishment 51–57 (1966). See also *Gregg* v. *Georgia,* 428 U. S. 153, 184, and n. 30 (opinion of STEWART, POWELL, and STEVENS, JJ.); H. Hart, Punishment and Responsibility 4–5 (1968); *id.,* at 158–173; F. Dostoevskii, Crime and Punishment (Coulson transl. 1964); I. Kant, The Philosophy of Law 195–198 (W. Hastie transl. 1887).

By contrast, pretrial detention is acceptable as a means of assuring the

Prior to conviction every individual is entitled to the benefit of a presumption both that he is innocent of prior criminal conduct and that he has no present intention to commit any offense in the immediate future.[11] That presumption does

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detainee's presence at trial and of maintaining his and his fellows' safety in the meantime. Its focus is therefore essentially forward looking, general, and nonnormative. Because this type of government sanction is primarily designed for the future benefit of the public at large and implies no moral judgment about the person affected, it is properly classified as regulatory. See H. Packer, The Limits of the Criminal Sanction 5 (1968).

The Court's bill of attainder cases have recognized the distinction between regulation and punishment in analyzing the concept of "legislative punishment." Thus, on the one hand, post bellum statutes excluding persons who had been sympathetic to the Confederacy from certain professions were found unconstitutional because of the backward-looking focus on the acts of specific individuals. *Ex parte Garland,* 4 Wall. 333; *Cummings* v. *Missouri,* 4 Wall. 277. However, later statutes requiring persons to take loyalty oaths before getting the benefits of certain labor legislation and before being employed in a public job were found constitutional because of their future orientation and more general purpose. *American Communications Assn.* v. *Douds,* 339 U. S. 382, 413–415; *Garner* v. *Board of Public Works,* 341 U. S. 716, 722–725.

[11] On at least two occasions, this Court has relied upon this presumption as a justification for shielding a person awaiting trial from potentially oppressive governmental actions. *McGinnis* v. *Royster,* 410 U. S. 263, 273 ("[I]t would hardly be appropriate for the State to undertake in the pretrial detention period programs to rehabilitate a man still clothed with a presumption of innocence"); *Stack* v. *Boyle,* 342 U. S. 1, 4 ("Unless [the] right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning"). These cases demonstrate that the presumption—or, as it was called last Term, the "assumption"—of innocence that is indulged until evidence has convinced a jury to the contrary beyond a reasonable doubt, see *Taylor* v. *Kentucky,* 436 U. S. 478, 484 n. 12, colors all of the government's actions toward persons not yet convicted. In sum, although there may be some question as to what it means to treat a person as if he were guilty, there can be no dispute that the government may never do so at any point in advance of conviction.

Relying on nothing more than the force of assertion, and without even mentioning *McGinnis* and *Stack,* the Court states that the presumption of innocence "has no application to a determination of the rights of a pretrial

not imply that he may not be detained or otherwise subjected to restraints on the basis of an individual showing of probable cause that he poses relevant risks to the community. For our system of justice has always and quite properly functioned on the assumption that probable cause to believe (1) that a person has committed a crime, and (2) that absent the posting of bail he poses at least some risk of flight,[12] justifies pretrial detention to ensure his presence at trial.[13]

The fact that an individual may be unable to pay for a bail bond, however, is an insufficient reason for subjecting him to indignities that would be appropriate punishment for convicted felons. Nor can he be subject on that basis to onerous restraints that might properly be considered regulatory with respect to particularly obstreperous or dangerous arrestees. An innocent man who has no propensity toward immediate violence, escape, or subversion may not be dumped into a pool of second-class citizens and subjected to restraints designed to regulate others who have. For him, such treatment

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detainee during confinement before his trial has even begun." *Ante*, at 533. But having so recently reiterated that the presumption is "fundamental," see *Taylor* v. *Kentucky*, *supra*, at 483, I cannot believe the Court means what it seems to be saying.

[12] In many instances, detention will occur although the risk of flight is exceedingly low. This is because there is "a large class of persons for whom any bail at all is 'excessive bail.' They are the people loosely referred to as 'indigents.' Studies of the operation of the bail system have demonstrated that even at the very lowest levels of bail—say $500, where the bail bond premium may be only $25 or $50—there is a very substantial percentage of persons who do not succeed in making bail and are therefore held in custody pending trial." Packer, *supra* n. 10, at 216.

[13] American jurisdictions have traditionally relied on a pretrial system of "bail or jail" to assure that arrestees appear at trial. *Id.*, at 211. As to the bail aspect of the system, the Eighth Amendment is explicit that whatever steps the Government takes must not be excessive in relation to that purpose. *Stack* v. *Boyle*, *supra*, at 5. See 18 U. S. C. § 3146 (a). Although not expressed in the Constitution, a like restraint on the other half of the pretrial system is a logical corollary to the "No Excess Bail" Clause.

amounts to punishment. And because the due process guarantee is individual and personal, it mandates that an innocent person be treated as an individual human being and be free of treatment which, as to him, is punishment.[14]

It is not always easy to determine whether a particular restraint serves the legitimate, regulatory goal of ensuring a detainee's presence at trial and his safety and security in the meantime, or the unlawful end of punishment. But the courts have performed that task in the past, and can and should continue to perform it in the future. Having recognized the constitutional right to be free of punishment, the Court may not point to the difficulty of the task as a justification for confining the scope of the punishment concept so narrowly that it effectively abdicates to correction officials the judicial responsibility to enforce the guarantees of due process.

In addressing the constitutionality of the rules at issue in this case, the Court seems to say that as long as the correction officers are not motivated by "an expressed intent to punish" their wards, *ante,* at 538, and as long as their rules are not "arbitrary or purposeless," *ante,* at 539, these rules are an acceptable form of regulation and not punishment. Lest that test be too exacting, the Court abjectly defers to the prison administrator unless his conclusions are " 'conclusively shown to be wrong.' " *Ante,* at 555, quoting *Jones* v. *North Carolina Prisoners' Labor Union,* 433 U. S. 119, 132.[15]

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[14] Indeed, this Court has recognized on previous occasions that individualization is sometimes necessary to prevent clearly punitive sanctions from being administered in a cruel and unusual manner. *Woodson* v. *North Carolina,* 428 U. S. 280, 304; *Trop* v. *Dulles,* 356 U. S. 86, 100.

[15] Even if the Court were to apply this aspect of its test in a meaningful way, it would add little to the concept of punishment that is impermissible under the Due Process Clause. The Court states this test as follows: "[I]f a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitution-

Applying this test, the Court concludes that enforcement of the challenged restrictions does not constitute punishment because there is no showing of a subjective intent to punish and there is a rational basis for each of the challenged rules. In my view, the Court has reached an untenable conclusion because its test for punishment is unduly permissive.

The requirement that restraints have a rational basis provides an individual with virtually no protection against punishment. Any restriction that may reduce the cost of the facility's warehousing function could not be characterized as "arbitrary or purposeless" and could not be "conclusively shown" to have no reasonable relation to the Government's mission.[16] This is true even of a restraint so severe that it might be cruel and unusual.

Nor does the Court's intent test ensure the individual the protection that the Constitution guarantees. For the Court seems to use the term "intent" to mean the subjective intent of the jail administrator. This emphasis can only "encourage hypocrisy and unconscious self-deception."[17] While a

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ally be inflicted upon detainees *qua* detainees." *Ante,* at 539. It is readily apparent that this standard is nothing more than the "rational basis" requirement that even presumptively valid economic and social regulations must satisfy to pass muster under the Due Process Clause. Accordingly, if a court followed the path proposed in the quotation above, it would take unnecessary steps. For governmental activity that affects even minor interests and is "arbitrary or purposeless" is unconstitutional whether or not it is punishment. See, *e. g., Rinaldi* v. *Yeager,* 384 U. S. 305; *Illinois Elections Board* v. *Socialist Workers Party,* 440 U. S. 173.

[16] Beyond excluding expressly intended punishment, the Court puts no restrictions on the goals that it recognizes as legitimate; under its test the Government need only show some rational nexus to security, order, or the apparently open-ended class of "operational concerns" facing the jail administrator, *ante,* at 540, and the restriction will be upheld.

[17] "[The subjective approach] focuses on what an interested party intends rather than on what a detached observer thinks, thereby depriving the distinction [between punishment and other types of government activity] of any pretense to objectivity. If a prison warden thinks that his

subjective intent may provide a sufficient reason for finding that punishment has been inflicted, such an intent is clearly not a necessary nor even the most common element of a punitive sanction.

In short, a careful reading of the Court's opinion reveals that it has attenuated the detainee's constitutional protection against punishment into nothing more than a prohibition against irrational classifications or barbaric treatment. Having recognized in theory that the source of that protection is the Due Process Clause, the Court has in practice defined its scope in the far more permissive terms of equal protection and Eighth Amendment analysis.

Prior to today, our cases have unequivocally adopted a less obeisant and more objective approach to punishment than the one the Court applies here. In my judgment, those decisions provide the framework for the correct analysis of the punishment issue in this case.

The leading case is *Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144. The Court's conclusion that the statute in question was punitive was expressly based on "the objective manifestations of congressional purpose." *Id.,* at 169.[18] The Court also recognized that in many cases such manifestations as it relied upon—the wording and construction of predecessor

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inmates are better off in his custody than they would be in the world outside, then by [the subjective] definition what he is administering is Treatment rather than Punishment. If the legislature that passes a compulsory commitment statute for narcotics addicts is motivated by hostility toward addicts, commitment is Punishment; if it is motivated by compassion, commitment is Treatment. And if it is motivated by both hostility and compassion? Other objections aside, what use can possibly be made of such a definition?

"Other objections cannot be left aside, because they demonstrate that [the subjective] definition not only is unintelligible but leads to quite dangerous consequences. . . . [For] [t]o allow the characterization to turn on the intention of the administrator is to encourage hypocrisy and unconscious self-deception." Packer, *supra* n. 10, at 32–33.

[18] Accord, *United States* v. *Lovett,* 328 U. S. 303, 311.

provisions as well as the congressional Reports on the provision itself, *id.*, at 169–184—would be unavailable [19] or untrustworthy.[20] In such cases, which surely include those in which the actions of an administrator rather than an Act of Congress are at issue, the Court stated that certain other "criteria" must be applied "to the face" of the official action to determine if it is punitive. *Ibid.* Illustrative of these objective "criteria" were several listed by the Court:

> "Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned . . . ." *Id.*, at 168–169.

Today the Court does not expressly disavow the objective criteria identified in *Mendoza-Martinez*. In fact, in a footnote, see *ante*, at 539 n. 20, it relies on one of those criteria in order to answer an otherwise obvious criticism of the test the Court actually applies in this case. Under the test as the Court explains it today, prison guards could make regular use of dungeons, chains, and shackles, since such practices would make it possible to maintain security with a smaller number of guards. Commendably, however, the Court expressly rejects this application of its test by stating that the avail-

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[19] Some state courts have had to resort to such criteria even when analyzing the punitive content of legislation because many state assemblies publish no record of their deliberations. *E. g., Starkweather* v. *Blair*, 245 Minn. 371, 71 N. W. 2d 869 (1955).

[20] "[E]ven a clear legislative classification of a statute as 'non-penal' would not alter the fundamental nature of a plainly penal statute." *Trop* v. *Dulles*, 356 U. S., at 95 (plurality opinion).

ability of less harsh alternatives would give rise to an inference that the practice was motivated by an intent to punish.

Although it is not easy to reconcile the footnote rejection of chains and shackles with the rest of the Court's analysis, this footnote confirms my view that a workable standard must allow a court to infer that punishment has been inflicted by evaluating objective criteria such as those delineated in *Mendoza-Martinez.* When sanctions involve "affirmative disabilit[ies]" and when they have "historically been regarded as a punishment," *Kennedy* v. *Mendoza-Martinez,* 372 U. S., at 168–169, courts must be sensitive to the possibility that those sanctions are punitive. So, too, when the rules governing detention fail to draw any distinction among those who are detained—suggesting that all may be subject to rules designed for the most dangerous few—careful scrutiny must be applied. Finally, and perhaps most important, when there is a significant and unnecessary disparity between the severity of the harm to the individual and the demonstrated importance of the regulatory objective, see *ibid.*, courts must be justified in drawing an inference of punishment.

## II

When measured against an objective standard, it is clear that the four rules discussed in Part III of the Court's opinion are punitive in character. All of these rules were designed to forestall the potential harm that might result from smuggling money, drugs, or weapons into the institution. Such items, it is feared, might be secreted in hard-cover books, packages of food or clothing, or body cavities. That fear provides the basis for a total prohibition on the receipt of hard-cover books (except from publishers, book clubs, or bookstores) or packages of food, for a visual search of body cavities after every visit, and for excluding the detainee from his cell while his personal belongings are searched by a guard.

There is no question that jail administrators have a legitimate interest in preventing smuggling. But it is equally

clear that that interest is being served here in a way that punishes many if not all of the detainees.

The challenged practices concededly deprive detainees of fundamental rights and privileges of citizenship beyond simply the right to leave. The Court recognizes this premise, but it dismisses its significance by asserting that detainees may be subjected to the "'withdrawal or limitation'" of fundamental rights. *Ante,* at 546, quoting *Price* v. *Johnston,* 334 U. S. 266, 285.[21] I disagree. The withdrawal of rights is

[21] Although the Court's discussion of this point is laced with citations of prison cases such as *Price, ante,* at 545–547, it fails to mention a single precedent dealing with pretrial detainees. Cf. *Houchins* v. *KQED, Inc.,* 438 U. S. 1, 37–38 (STEVENS, J., dissenting); *O'Brien* v. *Skinner,* 414 U. S. 524; *Goosby* v. *Osser,* 409 U. S. 512.

Having concluded that detainees' rights are "limited," the Court is reduced, for example, to analyzing restrictions on First Amendment rights in the deferential language of "minimum rationality"—language traditionally applied to restrictions on economic activities such as selling hot dogs or eyeglasses. *New Orleans* v. *Dukes,* 427 U. S. 297; *Williamson* v. *Lee Optical Co.,* 348 U. S. 483.

The First Amendment is not the only victim of the Court's analysis. It also devalues the Fourth Amendment as it applies to pretrial detainees. This is particularly evident with respect to the Court's discussion of body-cavity searches. Although it recognizes the detainee's constitutionally protected interest in privacy, the Court immediately demeans that interest by affording it "diminished scope." The reason for the diminution is the detainee's limited expectation of privacy. *Ante,* at 557, 558. At first blush, the Court's rationale appears to be that once the detainee is told that he will not be permitted to carry on any of his activities in private, he cannot "reasonably" expect otherwise. But "reasonable expectations of privacy" cannot have this purely subjective connotation lest we wake up one day to headlines announcing that henceforth the Government will not recognize the sanctity of the home but will instead enter residences at will. The reasonableness of the expectation must include an objective component that refers to those aspects of human activity that the "reasonable person" typically expects will be protected from unchecked Government observation. Cf. *Katz* v. *United States,* 389 U. S. 347, 361 (Harlan, J., concurring). Hence, the question must be whether the Government *may,* without violating the Fourth Amendment, tell the detainee by words or by action that he has no or virtually no right to privacy. In my view, the

itself among the most basic punishments that society can exact, for such a withdrawal qualifies the subject's citizenship and violates his dignity.[22] Without question that kind of harm is an "affirmative disability" that "has historically been regarded as a punishment." [23]

This withdrawal of fundamental rights is not limited to those for whom punishment is proper, or to those detainees

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answer to this question must be negative: despite the fact of his confinement and the impossibility of retreat to the privacy of his home, the detainee must have the right to privacy that we all retain when we venture out into public places. And surely the scope of that privacy is not so diminished that it does not include an expectation that body cavities will not be exposed to view. Absent probable cause, therefore, I would hold that such searches of pretrial detainees may not occur.

[22] The classic example of the coincidence of punishment and the total deprivation of rights is voting. Thus, in *Richardson* v. *Ramirez*, 418 U. S. 24, the Court, although recognizing the importance of the right to vote, *id.*, at 54, see *Reynolds* v. *Sims*, 377 U. S. 533, 561, found support in § 2 of the Fourteenth Amendment for denying convicted felons the right to vote. Cf. *O'Brien* v. *Skinner*, *supra* (finding certain restrictions on absentee voting by pretrial detainees unconstitutional under the Equal Protection Clause). See also *Goosby* v. *Osser*, *supra*.

This is certainly not to say that the fact of conviction justifies the total deprivation of all constitutionally protected rights. Having abandoned the concept of the prisoner as a slave of the state, *e. g.*, *Morrissey* v. *Brewer*, 408 U. S. 471, the Court has also rejected any ironclad exclusion of such persons from the protection of the Constitution. *E. g.*, *Wolff* v. *McDonnell*, 418 U. S. 539, 555–556; *Pell* v. *Procunier*, 417 U. S. 817, 822; *Cruz* v. *Beto*, 405 U. S. 319; *Lee* v. *Washington*, 390 U. S. 333. Nonetheless, it also recognizes "that a prison inmate retains [only those] rights that are not inconsistent . . . with the legitimate penological objectives of the corrections system." *Pell* v. *Procunier*, *supra*, at 822. Cf. *Lanza* v. *New York*, 370 U. S. 139.

[23] *E. g.*, *Wolff* v. *McDonnell*, *supra*, at 555; *Richardson* v. *Ramirez*, *supra*, at 43–53. The Court has probably relied upon historical analysis more often than on any of the other objective factors discussed in *Kennedy* v. *Mendoza-Martinez*, in determining whether some government sanction is punitive. *E. g.*, *Cummings* v. *Missouri*, 4 Wall. 277; *Ex parte Wilson*, 114 U. S. 417, 426–429; *Mackin* v. *United States*, 117 U. S. 348, 350–352; *Wong Wing* v. *United States*, 163 U. S. 228, 237–238.

posing special security risks. The MCC houses convicted persons along with pretrial detainees. The former may constitutionally be punished, so long as that punishment is not cruel and unusual. And the fact of their long-term confinement may provide greater justification for concerns with ongoing smuggling operations, violence, or escape.[24] Moreover, there may certainly be among the pretrial detainees, who cannot be punished, some whose background or history suggests a special danger that they will attempt to smuggle contraband into the jail. The rules at issue here, however, are not limited to those who may be constitutionally punished, or to those particularly dangerous detainees for whom onerous restraint is an appropriate regulation. Rather, the rules apply indiscriminately to all.

It is possible, of course, that the MCC officials have determined not to punish the convicted criminals who are confined there, but merely to regulate or detain them. It is possible, too, that as to the detainees, the rules that have been adopted and that are at issue here serve to impose only those restraints

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[24] The prospect of long-term incarceration facing an inmate increases his incentive to use illicit means to obtain luxuries that his imprisonment would otherwise deny him. Moreover, the fact of long-term incarceration of a large number of persons is conducive to the development of an institutional subeconomy and even subgovernment that often thrives on contraband and is inconsistent with the orderly operation of the facility. See, *e. g.*, H. Mattick, The Prosaic Sources of Prison Violence, Occasional Papers of the University of Chicago Law School, No. 3, Mar. 15, 1972.

As the foregoing indicates, I believe the analysis of the four rules as applied to convicted prisoners is different from that as applied to pretrial detainees. Not only do the due process and other rights of the two have different scope, but the Government's security interests also differ. In my view, the courts below, in erroneously applying the same standards to both sets of inmates and in focusing on detainees, did not adequately develop the record with respect to convicts. Accordingly, I would remand the question of the validity of the four rules in the context of convicted prisoners for further proceedings. Cf. *United States ex rel. Miller* v. *Twomey*, 479 F. 2d 701, 719 (CA7 1973).

needed to regulate the least dangerous of the group. But the Government does not even suggest that the convicted criminals are not being punished during the confinement at MCC.[25] And common sense suggests that if one set of rules is applied indiscriminately to detainees, those rules will serve to regulate the most dangerous—not the least—of the group. Indeed, prison security might well be in jeopardy were it otherwise. If that is true, and if the restraints are as substantial and fundamental as those here, then the conclusion that at least some, if not all, of the detainees are being punished is virtually inescapable.

That this is indeed the case here is confirmed by the excessive disparity between the harm to the individuals occasioned by these rules and the importance of their regulatory objective. The substantiality of the harm to the detainees cannot be doubted. The rights involved are among those that are specifically protected by the Constitution. That fact alone underscores our societal evaluation of their importance. The enforcement of these rules in the MCC, moreover, is a clear affront to the dignity of the detainee as a human being.[26]

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[25] In fact, the Government admitted below that the "restrictions on the possession of personal property" at MCC "serve the legitimate purpose of punishment" with respect to convicted inmates as well as the security purposes relied on in the present context of pretrial detainees. *United States ex rel. Wolfish* v. *Levi*, 439 F. Supp. 114, 153 (SDNY 1977).

[26] This affront may itself constitute punishment because of its retributive character. *Mendoza-Martinez* makes clear that a sanction is punitive if it "will promote [a] traditional ai[m] of punishment—retribution." 372 U. S., at 168–169. In its retributive aspect, "'[p]unishment is the way in which society expresses its denunciation for wrong doing.'" *Gregg* v. *Georgia*, 428 U. S., at 184, and n. 30 (opinion of STEWART, POWELL, and STEVENS, JJ.), quoting Lord Justice Denning's testimony before the Royal Commission on Capital Punishment. See also letter from Judge Learned Hand to the editors of the University of Chicago Law Review (undated), reprinted in 22 U. Chi. L. Rev. 319 (1965); sources cited in the first paragraph of n. 10, *supra*. A focus of this "denunciatory" approach is the right of society, in significant respects, to deny the civic and human dignity

To prohibit detainees from receiving books or packages communicates to the detainee that he, his friends, and his family cannot be trusted. And in the process, it eliminates one of his few remaining contacts with the outside world. The practice of searching the detainee's private possessions in his absence, frequently without care, *United States ex rel. Wolfish* v. *Levi*, 439 F. Supp. 114, 149 (SDNY 1977), offends not only his privacy interest, but also his interest in "minimal dignity," *ibid.* Finally, the search of private body cavities has been found to engender "deep degradation" and "terror" in the inmates, *id.*, at 147: the price of such searches is so high as to lead detainees to forgo visits with friends and family altogether. *Id.*, at 148.

In contrast to these severe harms to the individual, the interests served by these rules appear insubstantial. As to the room searches, nothing more than the convenience of the corrections staff supports the refusal to allow detainees to observe at a reasonable distance. While petitioners have raised the fear that inmates may become violent during such searches and may distract the guards, the District Court specifically found that they had made no showing of any pattern of violence or disruption to support these purported fears. *Id.*, at 149. And absent such a showing, there is no more reason to ban all detainees from observing the searches of their rooms than there would be to ban them from every area in the MCC where guards or other inmates are present.

The prohibitions on receiving books and packages fare no better. The District Court found no record of "untoward experience" with respect to the book rule, *United States ex rel. Wolfish* v. *United States*, 428 F. Supp. 333, 340 (SDNY 1977), and no support in the evidence for the petitioners' "dire predictions" as to packages, 439 F. Supp., at 152. The simple

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of persons who have been convicted of doing wrong. Cf. *Gregg* v. *Georgia*, *supra*, at 173, 182 (fundamental violations of "human dignity" may constitute cruel and unusual punishment).

fact is, and the record and the case law make clear, that in many prisons housing criminals convicted of serious crimes—where the inmates as a class may well be more dangerous, where smuggling is likely to be a far more serious problem, and where punishment is appropriate—packages of various sorts are routinely admitted subject to inspection. *Ibid.* The administrators here have hardly established that the corrections staff at MCC is incapable of performing similar inspections with respect to an inmate population which has a far greater entitlement to them. And the unsupported claim that food or goods may be used for barter or may introduce sanitation problems ignores not only the possibility of reasonable regulation, but also the fact that similar goods are sold in the MCC commissary, *id.*, at 152–153, and are no more immune from barter or spoilage.

The body-cavity search—clearly the greatest personal indignity—may be the least justifiable measure of all. After every contact visit a body-cavity search is mandated by the rule. The District Court's finding that these searches have failed in practice to produce any demonstrable improvement in security, *id.*, at 147, is hardly surprising.[27] Detainees and their visitors are in full view during all visits, and are fully clad. To insert contraband in one's private body cavities during such a visit would indeed be "an imposing challenge to nerves and agility." *Ibid.* There is no reason to expect, and the petitioners have established none, that many pretrial detainees would attempt, let alone succeed, in surmounting this challenge absent the challenged rule. Moreover, as the District Court explicitly found, less severe alternatives are available to ensure that contraband is not transferred during visits. *Id.*, at 147–148. Weapons and other dangerous instruments, the items of greatest legitimate concern, may be

[27] Indeed, the District Court found the searches entirely ineffective in some of their most offensive manifestations (*e. g.*, anal searches). 439 F. Supp., at 147.

discovered by the use of metal detecting devices or other equipment commonly used for airline security. In addition, inmates are required, even apart from the body-cavity searches, to disrobe, to have their clothing inspected, and to present open hands and arms to reveal the absence of any concealed objects. These alternative procedures, the District Court found, "amply satisf[y]" the demands of security. *Id.*, at 148. In my judgment, there is no basis in this record to disagree.

It may well be, as the Court finds, that the rules at issue here were not adopted by administrators eager to punish those detained at MCC. The rules can all be explained as the easiest way for administrators to ensure security in the jail. But the easiest course for jail officials is not always one that our Constitution allows them to take. If fundamental rights are withdrawn and severe harms are indiscriminately inflicted on detainees merely to secure minimal savings in time and effort for administrators, the guarantee of due process is violated.

In my judgment, each of the rules at issue here is unconstitutional. The four rules do indiscriminately inflict harm on all pretrial detainees in MCC. They are all either unnecessary or excessively harmful, particularly when judged against our historic respect for the dignity of the free citizen. I think it is unquestionably a form of punishment to deny an innocent person the right to read a book loaned to him by a friend or relative while he is temporarily confined, to deny him the right to receive gifts or packages, to search his private possessions out of his presence, or to compel him to exhibit his private body cavities to the visual inspection of a guard. Absent probable cause to believe that a specific individual detainee poses a special security risk, none of these practices would be considered necessary, or even arguably reasonable, if the pretrial detainees were confined in a facility separate and apart from convicted prisoners. If reasons of

convenience justify intermingling the two groups, it is not too much to require the facility's administrator to accept the additional inspection burdens that would result from denying them the right to subject citizens to these humiliating indignities. I would affirm the judgment of the Court of Appeals as to all four of these rules.[28]

III

The so-called "double-bunking" issue was resolved by the District Court on cross-motions for summary judgment. The record was compiled and the issue decided on the basis of a legal test that all of us now agree was erroneous.[29] If the record is incomplete, or if it discloses any material question of fact concerning the punitive character of the housing conditions at MCC, a remand for trial is required. Three basic facts dictate that result.

First, as earlier emphasized, MCC houses convicted prisoners along with pretrial detainees. Both classes of inmates are subjected to the same conditions. It may be that the Government—despite representations to the contrary, see 439 F. Supp., at 153—conceives of the confinement of convicts in the facility as a vacation for them from the punitive rigors of prison life. But the opposite conclusion—that the detainees are instead being subjected to some of those rigors—is at least an equally justifiable inference from the facts revealed by the record, particularly in view of the other rules applicable to both classes.

Second, the Government acknowledges that MCC has been used to house twice as many inmates as it was designed to

[28] The District Court reserved decision on all of these practices save the restriction on receipt of hardback books until a full trial on the merits. It is accordingly appropriate to resolve these issues now without a remand.

[29] I do not understand how the Court, having quite thoroughly demonstrated that the District Court applied an erroneous legal test, *ante*, at 530, 532–535, can nonetheless rely on that court's conclusion that no disputed issues of material fact prevented it from applying its erroneous test to the housing issue. *Ante*, at 541 n. 24.

accommodate.[30] The design capacity of a building is one crucial indication of its purpose. So is the later abandonment of that design in favor of a substantially more crowded and

[30] "The decisive reality, however, not seriously open to debate, is that the rooms were *designed* and built to hold a single person, not more. The conclusion is compelled by an array of undisputed facts. To begin with, petitioners invoke the high authority of the architect who designed the MCC and who, in sworn testimony recorded in this court, has described a room like the ones he drew, housing one inmate, as a 'very basic planning principle.' Contrasting dormitories with rooms, he went on to say:

" 'Dormitories are a much more flexible kind of a thing, you see. That is the only real area in that particular facility. One of the reasons why there's been a tendency to go to single rooms is because it's a very clear and apparent violation of capacity when you try to put two people in a room. You can't put one and a third persons in a room. You can always up the population of a space, in which you put people in, and you can through more imaginative planning get better utilization of the space but there is an absoluteness of a room which is designed for one person, and to try to convert it into a two-person room, it's a clear violation of the capability of that space. There is no question there. There is more than enough, you know, objections to double-celling.'

"It is not necessary by any means to rely solely on what the architect *said;* the plain visual evidence of what he did demonstrates that the rooms he designed were for one inmate, not two or more. There is no place for each of two people, assigned by others to this unwanted intimacy, to walk or eat or write a letter or be quiet or be outside another's toilet. There is one shelf for toiletries and one for other things, neither adequate for two people. In the larger group of 100 double-celled rooms there is no place to hang a garment. The double-decker bunks by which these rooms have been changed from singles are so constructed that air from a vent, cold during our winter visit, blows out onto the upper bed a foot or so above body level. Many of the prisoners have blocked the vents to cope with this architecturally unintended unpleasantness. And, as a result the rooms are musty and unpleasant smelling. The single beds originally designed for these rooms each had two drawers built under them, mounted on casters for reasonably convenient use. In the reconstruction to house two inmates, it was found necessary to dismantle these caster arrangements; now each 'double' room has one of the old drawers lying loose under the lower bed or none at all for the two assigned occupants." *United States ex rel. Wolfish* v. *United States,* 428 F. Supp. 333, 336–337 (SDNY 1977) (footnote omitted; emphasis in original).

oppressive one. Certainly, the inference that what the architect designed to detain, the jailer has used to punish, is permissible, even if it may not be compelled or even probable.

Finally, MCC officials experienced little difficulty in complying with the preliminary order of the District Court to return the facility to its design capacity. The Court dismisses this fact as not *conclusive* on the question of purpose and reasonableness. *Ante,* at 542–543, n. 25. But the fact that the Government's lawful regulatory purpose could so easily be served by less severe conditions is certainly some evidence of a punitive purpose and of excessiveness. If the lawful purpose may be equally served by those new conditions at no greater cost, the record provides a basis for arguing that there is no legitimate reason for the extra degree of severity that has characterized the overcrowded conditions in the past.[31]

While I by no means suggest that any of these facts demonstrates that the detention conditions are punitive,[32] taken

[31] To these facts may be added some of the findings of the District Court: (1) Even at design capacity, "movement is more restricted at the MCC than in most other federal facilities," including those that exclusively house convicts, 439 F. Supp., at 125; (2) the doubling of the design capacity of individual cells leaves "no place for each of two people, assigned by others to this unwanted intimacy, to walk or eat or write a letter or be quiet or be outside another's toilet," places the person in the newly added upper bunk directly under the cold air vent, renders some of the furniture designed for the rooms unusable, and in general subjects the inmate to "foul odors, social stigma, humiliation, and denials of minimal privacy," 428 F. Supp., at 337, 339; (3) overall, the "living conditions [are] grossly short of minimal decency, and [have] no semblance of justification except [for] the general defense that the facilities of the Bureau of Prisons are *in toto* insufficient to house all the people consigned to them," 439 F. Supp., at 135. Without so stating expressly, the Court has rejected these findings. *Ante,* at 542–543. Because that rejection is not permissible absent a determination of clear error, and because no such determination has been made, its treatment of the District Court's findings is inexplicable. See *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 395 U. S. 100, 123.

[32] The ameliorative factors discussed by the Court, *ante,* at 542–543, might well convince the factfinder that the housing conditions are not punitive.

together they raise an issue of fact that should not be resolved by this Court, or even by the District Court, on a motion for summary judgment.

It is admittedly easier to conclude that the Due Process Clause prohibits preconviction punishment than it is to articulate a standard for determining if such punishment has occurred. But if the standard is to afford any meaningful protection for the citizen's liberty, it must require something more than either an explicit statement by the administrator that his rule is designed to inflict punishment, or a sanction that is so arbitrary that it would be invalid even if it were not punitive. However the test is phrased, it must at least be satisfied by an unexplained and significant disparity between the severity of the harm to the individual and the demonstrated importance of the nonpunitive objective served by it. I therefore respectfully dissent from the conclusion that the demeaning and unnecessary practices described in Part III of the Court's opinion do not constitute punishment, and also from the conclusion that the overcrowded housing conditions discussed in Part II do not even give rise to an inference that they have punitive qualities.

# BRANDENBURG *v.* OHIO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 492. Argued February 27, 1969.—Decided June 9, 1969.

Appellant, a Ku Klux Klan leader, was convicted under the Ohio Criminal Syndicalism statute for "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" and for "voluntarily assembl[ing] with any society, group or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism." Neither the indictment nor the trial judge's instructions refined the statute's definition of the crime in terms of mere advocacy not distinguished from incitement to imminent lawless action. *Held:* Since the statute, by its words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action, it falls within the condemnation of the First and Fourteenth Amendments. Freedoms of speech and press do not permit a State to forbid advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. *Whitney* v. *California*, 274 U. S. 357, overruled.

Reversed.

*Allen Brown* argued the cause for appellant. With him on the briefs were *Norman Dorsen, Melvin L. Wulf, Eleanor Holmes Norton,* and *Bernard A. Berkman.*

*Leonard Kirschner* argued the cause for appellee. With him on the brief was *Melvin G. Rueger.*

*Paul W. Brown,* Attorney General of Ohio, *pro se,* and *Leo J. Conway,* Assistant Attorney General, filed a brief for the Attorney General as *amicus curiae.*

PER CURIAM.

The appellant, a leader of a Ku Klux Klan group, was convicted under the Ohio Criminal Syndicalism statute for "advocat[ing] . . . the duty, necessity, or propriety

of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" and for "voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism." Ohio Rev. Code Ann. § 2923.13. He was fined $1,000 and sentenced to one to 10 years' imprisonment. The appellant challenged the constitutionality of the criminal syndicalism statute under the First and Fourteenth Amendments to the United States Constitution, but the intermediate appellate court of Ohio affirmed his conviction without opinion. The Supreme Court of Ohio dismissed his appeal, *sua sponte*, "for the reason that no substantial constitutional question exists herein." It did not file an opinion or explain its conclusions. Appeal was taken to this Court, and we noted probable jurisdiction. 393 U. S. 948 (1968). We reverse.

The record shows that a man, identified at trial as the appellant, telephoned an announcer-reporter on the staff of a Cincinnati television station and invited him to come to a Ku Klux Klan "rally" to be held at a farm in Hamilton County. With the cooperation of the organizers, the reporter and a cameraman attended the meeting and filmed the events. Portions of the films were later broadcast on the local station and on a national network.

The prosecution's case rested on the films and on testimony identifying the appellant as the person who communicated with the reporter and who spoke at the rally. The State also introduced into evidence several articles appearing in the film, including a pistol, a rifle, a shotgun, ammunition, a Bible, and a red hood worn by the speaker in the films.

One film showed 12 hooded figures, some of whom carried firearms. They were gathered around a large wooden cross, which they burned. No one was present

other than the participants and the newsmen who made the film. Most of the words uttered during the scene were incomprehensible when the film was projected, but scattered phrases could be understood that were derogatory of Negroes and, in one instance, of Jews.[1] Another scene on the same film showed the appellant, in Klan regalia, making a speech. The speech, in full, was as follows:

> "This is an organizers' meeting. We have had quite a few members here today which are—we have hundreds, hundreds of members throughout the State of Ohio. I can quote from a newspaper clipping from the Columbus, Ohio Dispatch, five weeks ago Sunday morning. The Klan has more members in the State of Ohio than does any other organization. We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken.
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> "We are marching on Congress July the Fourth, four hundred thousand strong. From there we are dividing into two groups, one group to march on St. Augustine, Florida, the other group to march into Mississippi. Thank you."

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[1] The significant portions that could be understood were:
"How far is the nigger going to—yeah."
"This is what we are going to do to the niggers."
"A dirty nigger."
"Send the Jews back to Israel."
"Let's give them back to the dark garden."
"Save America."
"Let's go back to constitutional betterment."
"Bury the niggers."
"We intend to do our part."
"Give us our state rights."
"Freedom for the whites."
"Nigger will have to fight for every inch he gets from now on."

The second film showed six hooded figures one of whom, later identified as the appellant, repeated a speech very similar to that recorded on the first film. The reference to the possibility of "revengeance" was omittted, and one sentence was added: "Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel." Though some of the figure in the films carried weapons, the speaker did not.

The Ohio Criminal Syndicalism Statute was enacted in 1919. From 1917 to 1920, identical or quite similar laws were adopted by 20 States and two territories. E. Dowell, A History of Criminal Syndicalism Legislation in the United States 21 (1939). In 1927, this Court sustained the constitutionality of California's Criminal Syndicalism Act, Cal. Penal Code §§ 11400–11402, the text of which is quite similar to that of the laws of Ohio. *Whitney* v. *California*, 274 U. S. 357 (1927). The Court upheld the statute on the ground that, without more, "advocating" violent means to effect political and economic change involves such danger to the security of the State that the State may outlaw it. Cf. *Fiske* v. *Kansas*, 274 U. S. 380 (1927). But *Whitney* has been thoroughly discredited by later decisions. See *Dennis* v. *United States*, 341 U. S. 494, at 507 (1951). These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[2] As we

[2] It was on the theory that the Smith Act, 54 Stat. 670, 18 U. S. C. § 2385, embodied such a principle and that it had been applied only in conformity with it that this Court sustained the Act's constitutionality. *Dennis* v. *United States*, 341 U. S. 494 (1951). That this was the basis for *Dennis* was emphasized in *Yates* v. *United States*, 354 U. S. 298, 320–324 (1957), in which the Court overturned con-

said in *Noto* v. *United States*, 367 U. S. 290, 297–298 (1961), "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." See also *Herndon* v. *Lowry*, 301 U. S. 242, 259–261 (1937); *Bond* v. *Floyd*, 385 U. S. 116, 134 (1966). A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control. Cf. *Yates* v. *United States*, 354 U. S. 298 (1957); *De Jonge* v. *Oregon*, 299 U. S. 353 (1937); *Stromberg* v. *California*, 283 U. S. 359 (1931). See also *United States* v. *Robel*, 389 U. S. 258 (1967); *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967); *Elfbrandt* v. *Russell*, 384 U. S. 11 (1966); *Aptheker* v. *Secretary of State*, 378 U. S. 500 (1964); *Baggett* v. *Bullitt*, 377 U. S. 360 (1964).

Measured by this test, Ohio's Criminal Syndicalism Act cannot be sustained. The Act punishes persons who "advocate or teach the duty, necessity, or propriety" of violence "as a means of accomplishing industrial or political reform"; or who publish or circulate or display any book or paper containing such advocacy; or who "justify" the commission of violent acts "with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism"; or who "voluntarily assemble" with a group formed "to teach or advocate the doctrines of criminal syndicalism." Neither the indictment nor the trial judge's instructions to the jury in any way refined the statute's bald definition of the crime

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victions for advocacy of the forcible overthrow of the Government under the Smith Act, because the trial judge's instructions had allowed conviction for mere advocacy, unrelated to its tendency to produce forcible action.

in terms of mere advocacy not distinguished from incitement to imminent lawless action.[3]

Accordingly, we are here confronted with a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action.[4] Such a statute falls within the condemnation of the First and Fourteenth Amendments. The contrary teaching of *Whitney* v. *California, supra,* cannot be supported, and that decision is therefore overruled.

*Reversed.*

MR. JUSTICE BLACK, concurring.

I agree with the views expressed by MR. JUSTICE DOUGLAS in his concurring opinion in this case that the "clear and present danger" doctrine should have no place

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[3] The first count of the indictment charged that appellant "did unlawfully by word of mouth advocate the necessity, or propriety of crime, violence, or unlawful methods of terrorism as a means of accomplishing political reform . . . ." The second count charged that appellant "did unlawfully voluntarily assemble with a group or assemblage of persons formed to advocate the doctrines of criminal syndicalism . . . ." The trial judge's charge merely followed the language of the indictment. No construction of the statute by the Ohio courts has brought it within constitutionally permissible limits. The Ohio Supreme Court has considered the statute in only one previous case, *State* v. *Kassay,* 126 Ohio St. 177, 184 N. E. 521 (1932), where the constitutionality of the statute was sustained.

[4] Statutes affecting the right of assembly, like those touching on freedom of speech, must observe the established distinctions between mere advocacy and incitement to imminent lawless action, for as Chief Justice Hughes wrote in *De Jonge* v. *Oregon, supra,* at 364: "The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental." See also *United States* v. *Cruikshank,* 92 U. S. 542, 552 (1876); *Hague* v. *CIO,* 307 U. S. 496, 513, 519 (1939); *NAACP* v. *Alabama ex rel. Patterson,* 357 U. S. 449, 460–461 (1958).

in the interpretation of the First Amendment. I join the Court's opinion, which, as I understand it, simply cites *Dennis* v. *United States,* 341 U. S. 494 (1951), but does not indicate any agreement on the Court's part with the "clear and present danger" doctrine on which *Dennis* purported to rely.

MR. JUSTICE DOUGLAS, concurring.

While I join the opinion of the Court, I desire to enter a *caveat.*

The "clear and present danger" test was adumbrated by Mr. Justice Holmes in a case arising during World War I—a war "declared" by the Congress, not by the Chief Executive. The case was *Schenck* v. *United States,* 249 U. S. 47, 52, where the defendant was charged with attempts to cause insubordination in the military and obstruction of enlistment. The pamphlets that were distributed urged resistance to the draft, denounced conscription, and impugned the motives of those backing the war effort. The First Amendment was tendered as a defense. Mr. Justice Holmes in rejecting that defense said:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

*Frohwerk* v. *United States,* 249 U. S. 204, also authored by Mr. Justice Holmes, involved prosecution and punishment for publication of articles very critical of the war effort in World War I. *Schenck* was referred to as a conviction for obstructing security "by words of persuasion." *Id.,* at 206. And the conviction in *Frohwerk* was sustained because "the circulation of the paper was

in quarters where a little breath would be enough to kindle a flame." *Id.*, at 209.

*Debs* v. *United States*, 249 U. S. 211, was the third of the trilogy of the 1918 Term. Debs was convicted of speaking in opposition to the war where his "opposition was so expressed that its natural and intended effect would be to obstruct recruiting." *Id.*, at 215.

> "If that was intended and if, in all the circumstances, that would be its probable effect, it would not be protected by reason of its being part of a general program and expressions of a general and conscientious belief." *Ibid.*

In the 1919 Term, the Court applied the *Schenck* doctrine to affirm the convictions of other dissidents in World War I. *Abrams* v. *United States*, 250 U. S. 616, was one instance. Mr. Justice Holmes, with whom Mr. Justice Brandeis concurred, dissented. While adhering to *Schenck*, he did not think that on the facts a case for overriding the First Amendment had been made out:

> "It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country." *Id.*, at 628.

Another instance was *Schaefer* v. *United States*, 251 U. S. 466, in which Mr. Justice Brandeis, joined by Mr. Justice Holmes, dissented. A third was *Pierce* v. *United States*, 252 U. S. 239, in which again Mr. Justice Brandeis, joined by Mr. Justice Holmes, dissented.

Those, then, were the World War I cases that put the gloss of "clear and present danger" on the First Amendment. Whether the war power—the greatest leveler of them all—is adequate to sustain that doctrine is debat-

able. The dissents in *Abrams, Schaefer,* and *Pierce* show how easily "clear and present danger" is manipulated to crush what Brandeis called "[t]he fundamental right of free men to strive for better conditions through new legislation and new institutions" by argument and discourse (*Pierce* v. *United States, supra,* at 273) even in time of war. Though I doubt if the "clear and present danger" test is congenial to the First Amendment in time of a declared war, I am certain it is not reconcilable with the First Amendment in days of peace.

The Court quite properly overrules *Whitney* v. *California,* 274 U. S. 357, which involved advocacy of ideas which the majority of the Court deemed unsound and dangerous.

Mr. Justice Holmes, though never formally abandoning the "clear and present danger" test, moved closer to the First Amendment ideal when he said in dissent in *Gitlow* v. *New York,* 268 U. S. 652, 673:

> "Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."

We have never been faithful to the philosophy of that dissent.

The Court in *Herndon* v. *Lowry*, 301 U. S. 242, overturned a conviction for exercising First Amendment rights to incite insurrection because of lack of evidence of incitement. *Id.*, at 259–261. And see *Hartzel* v. *United States*, 322 U. S. 680. In *Bridges* v. *California*, 314 U. S. 252, 261–263, we approved the "clear and present danger" test in an elaborate dictum that tightened it and confined it to a narrow category. But in *Dennis* v. *United States*, 341 U. S. 494, we opened wide the door, distorting the "clear and present danger" test beyond recognition.[1]

In that case the prosecution dubbed an agreement to teach the Marxist creed a "conspiracy." The case was submitted to a jury on a charge that the jury could not convict unless it found that the defendants "intended to overthrow the Government 'as speedily as circumstances would permit.'" *Id.*, at 509–511. The Court sustained convictions under that charge, construing it to mean a determination of "'whether the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.'"[2] *Id.*, at 510, quoting from *United States* v. *Dennis*, 183 F. 2d 201, 212.

Out of the "clear and present danger" test came other offspring. Advocacy and teaching of forcible overthrow of government as an abstract principle is immune from prosecution. *Yates* v. *United States*, 354 U. S. 298, 318. But an "active" member, who has a guilty knowledge and intent of the aim to overthrow the Government

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[1] See McKay, The Preference For Freedom, 34 N. Y. U. L. Rev. 1182, 1203–1212 (1959).

[2] See *Feiner* v. *New York*, 340 U. S. 315, where a speaker was arrested for arousing an audience when the only "clear and present danger" was that the hecklers in the audience would break up the meeting.

by violence, *Noto* v. *United States,* 367 U. S. 290, may be prosecuted. *Scales* v. *United States,* 367 U. S. 203, 228. And the power to investigate, backed by the powerful sanction of contempt, includes the power to determine which of the two categories fits the particular witness. *Barenblatt* v. *United States,* 360 U. S. 109, 130. And so the investigator roams at will through all of the beliefs of the witness, ransacking his conscience and his innermost thoughts.

Judge Learned Hand, who wrote for the Court of Appeals in affirming the judgment in *Dennis,* coined the "not improbable" test, 183 F. 2d 201, 214, which this Court adopted and which Judge Hand preferred over the "clear and present danger" test. Indeed, in his book, The Bill of Rights 59 (1958), in referring to Holmes' creation of the "clear and present danger" test, he said, "I cannot help thinking that for once Homer nodded."

My own view is quite different. I see no place in the regime of the First Amendment for any "clear and present danger" test, whether strict and tight as some would make it, or free-wheeling as the Court in *Dennis* rephrased it.

When one reads the opinions closely and sees when and how the "clear and present danger" test has been applied, great misgivings are aroused. First, the threats were often loud but always puny and made serious only by judges so wedded to the *status quo* that critical analysis made them nervous. Second, the test was so twisted and perverted in *Dennis* as to make the trial of those teachers of Marxism an all-out political trial which was part and parcel of the cold war that has eroded substantial parts of the First Amendment.

Action is often a method of expression and within the protection of the First Amendment.

Suppose one tears up his own copy of the Constitution in eloquent protest to a decision of this Court. May he be indicted?

Suppose one rips his own Bible to shreds to celebrate his departure from one "faith" and his embrace of atheism. May he be indicted?

Last Term the Court held in *United States* v. *O'Brien,* 391 U. S. 367, 382, that a registrant under Selective Service who burned his draft card in protest of the war in Vietnam could be prosecuted. The First Amendment was tendered as a defense and rejected, the Court saying:

> "The issuance of certificates indicating the registration and eligibility classification of individuals is a legitimate and substantial administrative aid in the functioning of this system. And legislation to insure the continuing availability of issued certificates serves a legitimate and substantial purpose in the system's administration." 391 U. S., at 377–378.

But O'Brien was not prosecuted for not having his draft card available when asked for by a federal agent. He was indicted, tried, and convicted for burning the card. And this Court's affirmance of that conviction was not, with all respect, consistent with the First Amendment.

The act of praying often involves body posture and movement as well as utterances. It is nonetheless protected by the Free Exercise Clause. Picketing, as we have said on numerous occasions, is "free speech plus." See *Bakery Drivers Local* v. *Wohl,* 315 U. S. 769, 775 (DOUGLAS, J., concurring); *Giboney* v. *Empire Storage Co.,* 336 U. S. 490, 501; *Hughes* v. *Superior Court,* 339 U. S. 460, 465; *Labor Board* v. *Fruit Packers,* 377 U. S. 58, 77 (BLACK, J., concurring), and *id.,* at 93 (HARLAN, J., dissenting); *Cox* v. *Louisiana,* 379 U. S. 559, 578 (opinion of BLACK, J.); *Food Employees* v. *Logan Plaza,* 391 U. S. 308, 326 (DOUGLAS, J., concurring). That means that it can be regulated when it comes to the "plus" or "action" side of the protest. It can be regulated as to

the number of pickets and the place and hours (see *Cox* v. *Louisiana, supra*), because traffic and other community problems would otherwise suffer.

But none of these considerations are implicated in the symbolic protest of the Vietnam war in the burning of a draft card.

One's beliefs have long been thought to be sanctuaries which government could not invade. *Barenblatt* is one example of the ease with which that sanctuary can be violated. The lines drawn by the Court between the criminal act of being an "active" Communist and the innocent act of being a nominal or inactive Communist mark the difference only between deep and abiding belief and casual or uncertain belief. But I think that all matters of belief are beyond the reach of subpoenas or the probings of investigators. That is why the invasions of privacy made by investigating committees were notoriously unconstitutional. That is the deep-seated fault in the infamous loyalty-security hearings which, since 1947 when President Truman launched them, have processed 20,000,000 men and women. Those hearings were primarily concerned with one's thoughts, ideas, beliefs, and convictions. They were the most blatant violations of the First Amendment we have ever known.

The line between what is permissible and not subject to control and what may be made impermissible and subject to regulation is the line between ideas and overt acts.

The example usually given by those who would punish speech is the case of one who falsely shouts fire in a crowded theatre.

This is, however, a classic case where speech is brigaded with action. See *Speiser* v. *Randall*, 357 U. S. 513, 536–537 (DOUGLAS, J., concurring). They are indeed inseparable and a prosecution can be launched for the overt

acts actually caused. Apart from rare instances of that kind, speech is, I think, immune from prosecution. Certainly there is no constitutional line between advocacy of abstract ideas as in *Yates* and advocacy of political action as in *Scales*. The quality of advocacy turns on the depth of the conviction; and government has no power to invade that sanctuary of belief and conscience.[3]

[3] See MR. JUSTICE BLACK, dissenting, in *Communications Assn.* v. *Douds*, 339 U. S. 382, 446, 449 *et seq.*

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

# SUPREME COURT OF THE UNITED STATES

Syllabus

## COUNTERMAN *v.* COLORADO

CERTIORARI TO THE COURT OF APPEALS OF COLORADO

No. 22–138. Argued April 19, 2023—Decided June 27, 2023

From 2014 to 2016, petitioner Billy Counterman sent hundreds of Facebook messages to C. W., a local singer and musician. The two had never met, and C. W. did not respond. In fact, she tried repeatedly to block him, but each time, Counterman created a new Facebook account and resumed contacting C. W. Several of his messages envisaged violent harm befalling her. Counterman's messages put C. W. in fear and upended her daily existence: C. W. stopped walking alone, declined social engagements, and canceled some of her performances. C. W. eventually contacted the authorities. The State charged Counterman under a Colorado statute making it unlawful to "[r]epeatedly . . . make[] any form of communication with another person" in "a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person . . . to suffer serious emotional distress." Colo. Rev. Stat. §18–3–602(1)(c). Counterman moved to dismiss the charge on First Amendment grounds, arguing that his messages were not "true threats" and therefore could not form the basis of a criminal prosecution. Following Colorado law, the trial court rejected that argument under an objective standard, finding that a reasonable person would consider the messages threatening. Counterman appealed, arguing that the First Amendment required the State to show not only that his statements were objectively threatening, but also that he was aware of their threatening character. The Colorado Court of Appeals disagreed and affirmed his conviction. The Colorado Supreme Court denied review.

*Held*: The State must prove in true-threats cases that the defendant had some subjective understanding of his statements' threatening nature, but the First Amendment requires no more demanding a showing than recklessness. Pp. 4–14.

(a) The First Amendment permits restrictions upon the content of

speech in a few limited areas. Among these historic and traditional categories of unprotected expression is true threats. True threats are "serious expression[s]" conveying that a speaker means to "commit an act of unlawful violence." *Virginia* v. *Black*, 538 U. S. 343, 359. The existence of a threat depends not on "the mental state of the author," but on "what the statement conveys" to the person on the receiving end. *Elonis* v. *United States*, 575 U. S. 723, 733. Yet the First Amendment may still demand a subjective mental-state requirement shielding some true threats from liability. That is because bans on speech have the potential to chill, or deter, speech outside their boundaries. An important tool to prevent that outcome is to condition liability on the State's showing of a culpable mental state. *Speiser* v. *Randall*, 357 U. S. 513, 526. That kind of "strategic protection" features in this Court's precedent concerning the most prominent categories of unprotected speech. *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 342. With regard to defamation, a public figure cannot recover for the injury such a statement causes unless the speaker acted with "knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 280. The same idea arises in the law respecting obscenity and incitement to unlawful conduct. See, *e.g., Hess* v. *Indiana,* 414 U. S. 105, 109; *Hamling* v. *United States*, 418 U. S. 87, 122–123. And that same reasoning counsels in favor of requiring a subjective element in a true-threats case. A speaker's fear of mistaking whether a statement is a threat, fear of the legal system getting that judgment wrong, and fear of incurring legal costs all may lead a speaker to swallow words that are in fact not true threats. Insistence on a subjective element in unprotected-speech cases, no doubt, has a cost: Even as it lessens chill of protected speech, it makes prosecution of otherwise proscribable, and often dangerous, communications harder. But a subjective standard is still required for true threats, lest prosecutions chill too much protected, non-threatening expression. Pp. 5–10.

(b) In this context, a recklessness standard—*i.e.,* a showing that a person "consciously disregard[ed] a substantial [and unjustifiable] risk that [his] conduct will cause harm to another," *Voisine* v. *United States*, 579 U. S. 686, 691—is the appropriate *mens rea.* Requiring purpose or knowledge would make it harder for States to counter true threats—with diminished returns for protected expression. Using a recklessness standard also fits with this Court's defamation decisions, which adopted a recklessness rule more than a half-century ago. The Court sees no reason to offer greater insulation to threats than to defamation. While this Court's incitement decisions demand more, the reason for that demand—the need to protect from legal sanction the

Syllabus

political advocacy a hair's-breadth away from incitement—is not present here. For true threats, recklessness strikes the right balance, offering "enough 'breathing space' for protected speech," without sacrificing too many of the benefits of enforcing laws against true threats. *Elonis*, 575 U. S., at 748. Pp. 10–14.

(c) The State prosecuted Counterman in accordance with an objective standard and did not have to show any awareness on Counterman's part of his statements' threatening character. That is a violation of the First Amendment. P. 14.

497 P. 3d 1039, vacated and remanded.

KAGAN, J., delivered the opinion of the Court, in which ROBERTS, C. J., and ALITO, KAVANAUGH, and JACKSON, JJ., joined. SOTOMAYOR, J., filed an opinion concurring in part and concurring in the judgment, in which GORSUCH, J., joined as to Parts I, II, III–A, and III–B. THOMAS, J., filed a dissenting opinion. BARRETT, J., filed a dissenting opinion, in which THOMAS, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, pio@supremecourt.gov, of any typographical or other formal errors.

# SUPREME COURT OF THE UNITED STATES

No. 22–138

BILLY RAYMOND COUNTERMAN, PETITIONER *v.* COLORADO

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF COLORADO

[June 27, 2023]

JUSTICE KAGAN delivered the opinion of the Court.

True threats of violence are outside the bounds of First Amendment protection and punishable as crimes. Today we consider a criminal conviction for communications falling within that historically unprotected category. The question presented is whether the First Amendment still requires proof that the defendant had some subjective understanding of the threatening nature of his statements. We hold that it does, but that a mental state of recklessness is sufficient. The State must show that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence. The State need not prove any more demanding form of subjective intent to threaten another.

## I

From 2014 to 2016, petitioner Billy Counterman sent hundreds of Facebook messages to C. W., a local singer and musician. The two had never met, and C. W. never responded. In fact, she repeatedly blocked Counterman. But each time, he created a new Facebook account and resumed his contacts. Some of his messages were utterly prosaic

("Good morning sweetheart"; "I am going to the store would you like anything?")—except that they were coming from a total stranger. 3 App. 465. Others suggested that Counterman might be surveilling C. W. He asked "[w]as that you in the white Jeep?"; referenced "[a] fine display with your partner"; and noted "a couple [of] physical sightings." 497 P. 3d 1039, 1044 (Colo. App. 2021). And most critically, a number expressed anger at C. W. and envisaged harm befalling her: "Fuck off permanently." *Ibid.* "Staying in cyber life is going to kill you." *Ibid.* "You're not being good for human relations. Die." *Ibid.*

The messages put C. W. in fear and upended her daily existence. She believed that Counterman was "threat[ening her] life"; "was very fearful that he was following" her; and was "afraid [she] would get hurt." 2 App. 177, 181, 193. As a result, she had "a lot of trouble sleeping" and suffered from severe anxiety. *Id.*, at 200; see *id.*, at 194–198. She stopped walking alone, declined social engagements, and canceled some of her performances, though doing so caused her financial strain. See *id.*, at 182–183, 199, 201–206, 238–239. Eventually, C. W. decided that she had to contact the authorities. *Id.*, at 184.

Colorado charged Counterman under a statute making it unlawful to "[r]epeatedly . . . make[] any form of communication with another person" in "a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person . . . to suffer serious emotional distress." Colo. Rev. Stat. §18–3–602(1)(c) (2022). The only evidence the State proposed to introduce at trial were his Facebook messages.[1]

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[1] The statute Counterman was charged with violating is titled a "stalking" statute and also prohibits "[r]epeatedly follow[ing], approach[ing], contact[ing], [or] plac[ing] under surveillance" another person. §18–3–602(1)(c). But the State had no evidence, beyond what Counterman claimed, that he actually had followed or surveilled C. W. For example, C. W. had never noticed anything of that kind. So the prosecution based

Counterman moved to dismiss the charge on First Amendment grounds, arguing that his messages were not "true threats" and therefore could not form the basis of a criminal prosecution. In line with Colorado law, the trial court assessed the true-threat issue using an "objective 'reasonable person' standard." *People* v. *Cross*, 127 P. 3d 71, 76 (Colo. 2006). Under that standard, the State had to show that a reasonable person would have viewed the Facebook messages as threatening. By contrast, the State had no need to prove that Counterman had any kind of "subjective intent to threaten" C. W. *In re R. D.*, 464 P. 3d 717, 731, n. 21 (Colo. 2020). The court decided, after "consider[ing] the totality of the circumstances," that Counterman's statements "r[o]se to the level of a true threat." 497 P. 3d, at 1045. Because that was so, the court ruled, the First Amendment posed no bar to prosecution. The court accordingly sent the case to the jury, which found Counterman guilty as charged.

The Colorado Court of Appeals affirmed. Counterman had urged the court to hold that the First Amendment required the State to show that he was aware of the threatening nature of his statements. Relying on its precedent, the court turned the request down: It "decline[d] today to say that a speaker's subjective intent to threaten is necessary" under the First Amendment to procure a conviction for threatening communications. *Id.*, at 1046 (quoting *R. D.*, 464 P. 3d, at 731, n. 21). Using the established objective standard, the court then approved the trial court's ruling that Counterman's messages were "true threats" and so were not protected by the First Amendment. 497 P. 3d, at 1050. The Colorado Supreme Court denied review.

Courts are divided about (1) whether the First Amendment requires proof of a defendant's subjective mindset in

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its case solely on Counterman's "[r]epeated[ ] . . . communication[s]" with C. W. *Ibid.*

true-threats cases, and (2) if so, what *mens rea* standard is sufficient. We therefore granted certiorari. 598 U. S. ___ (2023).

## II

True threats of violence, everyone agrees, lie outside the bounds of the First Amendment's protection. And a statement can count as such a threat based solely on its objective content. The first dispute here is about whether the First Amendment nonetheless demands that the State in a true-threats case prove that the defendant was aware in some way of the threatening nature of his communications.[2] Colorado argues that there is no such requirement. Counterman contends that there is one, based mainly on the likelihood that the absence of such a *mens rea* requirement will chill protected, non-threatening speech. Counterman's view, we decide today, is the more consistent with our precedent. To combat the kind of chill he references, our decisions have often insisted on protecting even some historically unprotected speech through the adoption of a subjective mental-state element. We follow the same path today, holding that the State must prove in true-threats cases that the defendant had some understanding of his

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[2] A preliminary clarification may be useful, concerning the difference between awareness of a communication's contents and awareness of its threatening nature. Everyone agrees, again, that the State must prove the former—and Colorado law appears to hold as much. See Colo. Rev. Stat. §18–3–602(1)(c); Brief for Respondent 18. So, for example, if a defendant delivers a sealed envelope without knowing that a threatening letter is inside, he cannot be liable for the communication. So too (though this common example seems fairly preposterous) if a "foreigner, ignorant of the English language, who would not know the meaning of the words," somehow manages to convey an English-language threat. *Elonis* v. *United States*, 575 U. S. 723, 738 (2015) (internal quotation marks omitted). The question in this case arises when the defendant (unlike in those hypotheticals) understands the content of the words, but may not grasp that others would find them threatening. Must he do so, under the First Amendment, for a true-threats prosecution to succeed?

statements' threatening character. The second issue here concerns what precise *mens rea* standard suffices for the First Amendment purpose at issue. Again guided by our precedent, we hold that a recklessness standard is enough. Given that a subjective standard here shields speech not independently entitled to protection—and indeed posing real dangers—we do not require that the State prove the defendant had any more specific intent to threaten the victim.

A

"From 1791 to the present," the First Amendment has "permitted restrictions upon the content of speech in a few limited areas." *United States* v. *Stevens*, 559 U. S. 460, 468 (2010). These "historic and traditional categories" are "long familiar to the bar" and perhaps, too, the general public. *Ibid.* One is incitement—statements "directed [at] producing imminent lawless action," and likely to do so. *Brandenburg* v. *Ohio*, 395 U. S. 444, 447 (1969) (*per curiam*). Another is defamation—false statements of fact harming another's reputation. See *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 340, 342 (1974). Still a third is obscenity—valueless material "appeal[ing] to the prurient interest" and describing "sexual conduct" in "a patently offensive way." *Miller* v. *California*, 413 U. S. 15, 24 (1973). This Court has "often described [those] historically unprotected categories of speech as being of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest" in their proscription. *Stevens*, 559 U. S., at 470 (internal quotation marks omitted; emphasis deleted).

"True threats" of violence is another historically unprotected category of communications. *Virginia* v. *Black*, 538 U. S. 343, 359 (2003); see *United States* v. *Alvarez*, 567 U. S. 709, 717–718 (2012) (plurality opinion). The "true" in that term distinguishes what is at issue from jests, "hyperbole,"

or other statements that when taken in context do not convey a real possibility that violence will follow (say, "I am going to kill you for showing up late"). *Watts* v. *United States*, 394 U. S. 705, 708 (1969) (*per curiam*). True threats are "serious expression[s]" conveying that a speaker means to "commit an act of unlawful violence." *Black*, 538 U. S., at 359. Whether the speaker is aware of, and intends to convey, the threatening aspect of the message is not part of what makes a statement a threat, as this Court recently explained. See *Elonis* v. *United States*, 575 U. S. 723, 733 (2015). The existence of a threat depends not on "the mental state of the author," but on "what the statement conveys" to the person on the other end. *Ibid.* When the statement is understood as a true threat, all the harms that have long made threats unprotected naturally follow. True threats subject individuals to "fear of violence" and to the many kinds of "disruption that fear engenders." *Black*, 538 U. S., at 360 (internal quotation marks omitted). The facts of this case well illustrate how.[3]

Yet the First Amendment may still demand a subjective mental-state requirement shielding some true threats from liability. The reason relates to what is often called a chilling effect. Prohibitions on speech have the potential to chill, or deter, speech outside their boundaries. A speaker may be unsure about the side of a line on which his speech

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[3]The concurrence relies on *Virginia* v. *Black*, 538 U. S. 343 (2003), to argue that the category of true threats itself incorporates a *mens rea* element. See *post*, at 9–11, 14 (SOTOMAYOR, J., concurring in part and concurring in judgment). But that claim is based on a misreading. The statements the concurrence quotes merely reflect that the statute involved in the case required a showing of intent. *Black* did not address whether the First Amendment demands such a showing, or why it might do so. See *United States* v. *Jeffries*, 692 F. 3d 473, 479–480 (CA6 2012) (Sutton, J.); see also *post*, at 9–10, and n. 4 (BARRETT, J., dissenting) (explaining that *Black* concerned a different part of the statute, preventing consideration of contextual factors in assessing whether a statement was a threat).

falls. Or he may worry that the legal system will err, and count speech that is permissible as instead not. See *Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U. S. 767, 777 (1986). Or he may simply be concerned about the expense of becoming entangled in the legal system. The result is "self-censorship" of speech that could not be proscribed—a "cautious and restrictive exercise" of First Amendment freedoms. *Gertz*, 418 U. S., at 340. And an important tool to prevent that outcome—to stop people from steering "wide[] of the unlawful zone"—is to condition liability on the State's showing of a culpable mental state. *Speiser* v. *Randall*, 357 U. S. 513, 526 (1958). Such a requirement comes at a cost: It will shield some otherwise proscribable (here, threatening) speech because the State cannot prove what the defendant thought. But the added element reduces the prospect of chilling fully protected expression. As this Court has noted, the requirement lessens "the hazard of self-censorship" by "compensat[ing]" for the law's uncertainties. *Mishkin* v. *New York*, 383 U. S. 502, 511 (1966). Or said a bit differently: "[B]y reducing an honest speaker's fear that he may accidentally [or erroneously] incur liability," a *mens rea* requirement "provide[s] 'breathing room' for more valuable speech." *Alvarez*, 567 U. S., at 733 (Breyer, J., concurring in judgment).

That kind of "strategic protection" features in our precedent concerning the most prominent categories of historically unprotected speech. *Gertz*, 418 U. S., at 342. Defamation is the best known and best theorized example. False and defamatory statements of fact, we have held, have "no constitutional value." *Id.*, at 340; see *Alvarez*, 567 U. S., at 718–719 (plurality opinion). Yet a public figure cannot recover for the injury such a statement causes unless the speaker acted with "knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 280 (1964); see *Garrison* v. *Louisiana*, 379 U. S. 64, 74 (1964) (using the same

standard for criminal libel). That rule is based on fear of "self-censorship"—the worry that without such a subjective mental-state requirement, the uncertainties and expense of litigation will deter speakers from making even truthful statements. *Sullivan*, 376 U. S., at 279. The First Amendment, we have concluded, "requires that we protect some falsehood in order to protect speech that matters." *Gertz*, 418 U. S., at 341.

The same idea arises in the law respecting obscenity and incitement to unlawful conduct. Like threats, incitement inheres in particular words used in particular contexts: Its harm can arise even when a clueless speaker fails to grasp his expression's nature and consequence. But still, the First Amendment precludes punishment, whether civil or criminal, unless the speaker's words were "intended" (not just likely) to produce imminent disorder. *Hess* v. *Indiana*, 414 U. S. 105, 109 (1973) (*per curiam*); see *Brandenburg*, 395 U. S., at 447; *NAACP* v. *Claiborne Hardware Co.*, 458 U. S. 886, 927–929 (1982). That rule helps prevent a law from deterring "mere advocacy" of illegal acts—a kind of speech falling within the First Amendment's core. *Brandenburg*, 395 U. S., at 449. And for a similar reason, the First Amendment demands proof of a defendant's mindset to make out an obscenity case. Obscenity is obscenity, whatever the purveyor's mental state. But we have repeatedly recognized that punishment depends on a "vital element of scienter"—often described as the defendant's awareness of "the character and nature" of the materials he distributed. *Hamling* v. *United States*, 418 U. S. 87, 122–123 (1974); see *Elonis*, 575 U. S., at 739 (reiterating *Hamling*). The rationale should by now be familiar. Yes, "obscene speech and writings are not protected." *Smith* v. *California*, 361 U. S. 147, 152 (1959). But punishing their distribution without regard to scienter would "have the collateral effect of inhibiting" protected expression. *Id.*, at 151.

Given "the ambiguities inherent in the definition of obscenity," the First Amendment "requires proof of scienter to avoid the hazard of self-censorship." *Mishkin*, 383 U. S., at 511.[4]

The same reasoning counsels in favor of requiring a subjective element in a true-threats case. This Court again must consider the prospect of chilling non-threatening expression, given the ordinary citizen's predictable tendency to steer "wide[] of the unlawful zone." *Speiser*, 357 U. S., at 526. The speaker's fear of mistaking whether a statement is a threat; his fear of the legal system getting that judgment wrong; his fear, in any event, of incurring legal costs—all those may lead him to swallow words that are in fact not true threats. Some 50 years ago, Justice Marshall made the point when reviewing a true-threats prosecution arguably

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[4] The dissent, in urging an objective standard here, reads the obscenity decisions as requiring merely that the defendant know "what the material depicts" (as a speaker must know a communication's contents). *Post*, at 5–6 (opinion of BARRETT, J.) (relying on *Hamling*, 418 U. S., at 120–123). But see the statements quoted above: That is not what they say. And indeed, this Court recently rejected the dissent's revisionist reading, explaining in detail—and in response to a near-identical argument—that the obscenity decisions demand awareness of "the *character* of [the materials,] not simply [their] contents." *Elonis*, 575 U. S., at 739–740 (discussing *Hamling*, 418 U. S., at 120–123, and *Mishkin*, 383 U. S., at 510).

The dissent's use of two other First Amendment categories—fighting words and false commercial speech—to support an objective test also falls flat. See *post*, at 3–4 (opinion of BARRETT, J.). This Court has not upheld a conviction under the fighting-words doctrine in 80 years. At the least, that doctrine is today a poor candidate for spinning off other First Amendment rules. False commercial speech is also a poor analog, though for different reasons. Put aside that the line of cases the dissent invokes has never been listed among the historically unprotected categories of speech. See, *e.g.*, *United States* v. *Stevens*, 559 U. S. 460, 468 (2010); see *supra*, at 5. Yet more relevant, the Court has often noted that commercial speech is less vulnerable to chill than most other speech is. See, *e.g.*, *Board of Trustees of State Univ. of N. Y.* v. *Fox*, 492 U. S. 469, 481 (1989). And it is the fear of chill that has led to state-of-mind requirements in the context of unprotected speech.

involving only political hyperbole. See *Rogers* v. *United States*, 422 U. S. 35 (1975). The Court in *Rogers* reversed the conviction on other grounds, but Justice Marshall focused on the danger of deterring non-threatening speech. An objective standard, turning only on how reasonable observers would construe a statement in context, would make people give threats "a wide berth." *Id.*, at 47 (concurring opinion). And so use of that standard would discourage the "uninhibited, robust, and wide-open debate that the First Amendment is intended to protect." *Id.*, at 48 (quoting *Sullivan*, 376 U. S., at 270).

The reasoning—and indeed some of the words—came straight from this Court's decisions insisting on a subjective element in other unprotected-speech cases, whether involving defamation, incitement, or obscenity. No doubt, the approach in all of those cases has a cost: Even as it lessens chill of protected speech, it makes prosecution of otherwise proscribable, and often dangerous, communications harder. And the balance between those two effects may play out differently in different contexts, as the next part of this opinion discusses. But the ban on an objective standard remains the same, lest true-threats prosecutions chill too much protected, non-threatening expression.

B

The next question concerns the type of subjective standard the First Amendment requires. The law of *mens rea* offers three basic choices. Purpose is the most culpable level in the standard mental-state hierarchy, and the hardest to prove. A person acts purposefully when he "consciously desires" a result—so here, when he wants his words to be received as threats. *United States* v. *Bailey*, 444 U. S. 394, 404 (1980). Next down, though not often distinguished from purpose, is knowledge. *Ibid.* A person acts knowingly when "he is aware that [a] result is practically certain to follow"—so here, when he knows to a practical

certainty that others will take his words as threats. *Ibid.* (internal quotation marks omitted). A greater gap separates those two from recklessness. A person acts recklessly, in the most common formulation, when he "consciously disregard[s] a substantial [and unjustifiable] risk that the conduct will cause harm to another." *Voisine* v. *United States*, 579 U. S. 686, 691 (2016) (internal quotation marks omitted). That standard involves insufficient concern with risk, rather than awareness of impending harm. See *Borden* v. *United States*, 593 U. S. ___, ___ (2021) (plurality opinion) (slip op., at 5). But still, recklessness is morally culpable conduct, involving a "deliberate decision to endanger another." *Voisine*, 579 U. S., at 694. In the threats context, it means that a speaker is aware "that others could regard his statements as" threatening violence and "delivers them anyway." *Elonis*, 575 U. S., at 746 (ALITO, J., concurring in part and dissenting in part).[5]

Among those standards, recklessness offers the right path forward. We have so far mostly focused on the constitutional interest in free expression, and on the correlative need to take into account threat prosecutions' chilling effects. But the precedent we have relied on has always recognized—and insisted on "accommodat[ing]"—the "competing value[]" in regulating historically unprotected expression. *Gertz*, 418 U. S., at 348. Here, as we have noted, that value lies in protecting against the profound

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[5]Just to complete the *mens rea* hierarchy, the last level is negligence—but that is an objective standard, of the kind we have just rejected. A person acts negligently if he is not but should be aware of a substantial risk—here, that others will understand his words as threats. See *Borden*, 593 U. S., at ___ (plurality opinion) (slip op., at 5). That makes liability depend not on what the speaker thinks, but instead on what a reasonable person would think about whether his statements are threatening in nature. See *Elonis*, 575 U. S., at 738 ("Having liability turn on whether a reasonable person regards the communication as a threat—regardless of what the defendant thinks—reduces culpability . . . to negligence" (internal quotation marks omitted)).

harms, to both individuals and society, that attend true threats of violence—as evidenced in this case. See *supra*, at 2, 6. The injury associated with those statements caused history long ago to place them outside the First Amendment's bounds. When despite that judgment we require use of a subjective mental-state standard, we necessarily impede some true-threat prosecutions. And as we go up the subjective *mens rea* ladder, that imposition on States' capacity to counter true threats becomes still greater—and, presumably, with diminishing returns for protected expression. In advancing past recklessness, we make it harder for a State to substantiate the needed inferences about *mens rea* (absent, as is usual, direct evidence). And of particular importance, we prevent States from convicting morally culpable defendants. See *Elonis*, 575 U. S., at 745 (opinion of ALITO, J.). For reckless defendants have done more than make a bad mistake. They have consciously accepted a substantial risk of inflicting serious harm.

Using a recklessness standard also fits with the analysis in our defamation decisions. As noted earlier, the Court there adopted a recklessness rule, applicable in both civil and criminal contexts, as a way of accommodating competing interests. See *supra*, at 7–8. In the more than half-century in which that standard has governed, few have suggested that it needs to be higher—in other words, that still more First Amendment "breathing space" is required. *Gertz*, 418 U. S., at 342. And we see no reason to offer greater insulation to threats than to defamation. See *Elonis*, 575 U. S., at 748 (opinion of ALITO, J.). The societal interests in countering the former are at least as high. And the protected speech near the borderline of true threats (even though sometimes political, as in *Rogers*) is, if anything, further from the First Amendment's central concerns than the chilled speech in *Sullivan*-type cases (*i.e.*, truthful reputation-damaging statements about public officials and figures).

It is true that our incitement decisions demand more—but the reason for that demand is not present here. When incitement is at issue, we have spoken in terms of specific intent, presumably equivalent to purpose or knowledge. See *Hess*, 414 U. S., at 109; *supra*, at 8. In doing so, we recognized that incitement to disorder is commonly a hair's-breadth away from political "advocacy"—and particularly from strong protests against the government and prevailing social order. *Brandenburg*, 395 U. S., at 447. Such protests gave rise to all the cases in which the Court demanded a showing of intent. See *ibid.*; *Hess*, 414 U. S., at 106; *Claiborne Hardware Co.*, 458 U. S., at 888, 928. And the Court decided those cases against a resonant historical backdrop: the Court's failure, in an earlier era, to protect mere advocacy of force or lawbreaking from legal sanction. See, *e.g.*, *Whitney* v. *California*, 274 U. S. 357 (1927); *Gitlow* v. *New York*, 268 U. S. 652 (1925); *Abrams* v. *United States*, 250 U. S. 616 (1919). A strong intent requirement was, and remains, one way to guarantee history was not repeated. It was a way to ensure that efforts to prosecute incitement would not bleed over, either directly or through a chilling effect, to dissenting political speech at the First Amendment's core. But the potency of that protection is not needed here. For the most part, the speech on the other side of the true-threats boundary line—as compared with the advocacy addressed in our incitement decisions—is neither so central to the theory of the First Amendment nor so vulnerable to government prosecutions. It is not just that our incitement decisions are distinguishable; it is more that they compel the use of a distinct standard here.[6]

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[6] Our obscenity decisions are of no help in this inquiry, because the Court has never determined the precise *mens rea* needed to impose punishment. In arguing to the contrary, the concurrence relies mainly on *Hamling*. *Post*, at 18–19 (opinion of SOTOMAYOR, J.). But if the dissent is wrong in saying that *Hamling* (and other obscenity decisions) allowed an objective inquiry, see *supra*, at 9, n. 4, the concurrence is wrong in

That standard, again, is recklessness. It offers "enough 'breathing space' for protected speech," without sacrificing too many of the benefits of enforcing laws against true threats. *Elonis*, 575 U. S., at 748 (opinion of ALITO, J.). As with any balance, something is lost on both sides: The rule we adopt today is neither the most speech-protective nor the most sensitive to the dangers of true threats. But in declining one of those two alternative paths, something more important is gained: Not "having it all"—because that is impossible—but having much of what is important on both sides of the scale.[7]

## III

It is time to return to Counterman's case, though only a few remarks are necessary. Counterman, as described above, was prosecuted in accordance with an objective standard. See *supra*, at 3. The State had to show only that a reasonable person would understand his statements as threats. It did not have to show any awareness on his part that the statements could be understood that way. For the reasons stated, that is a violation of the First Amendment.

We accordingly vacate the judgment of the Colorado Court of Appeals and remand the case for further proceedings not inconsistent with this opinion.

*It is so ordered.*

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suggesting that it required use of a purpose or knowledge standard. As to the concurrence's claim, *Hamling* held only that a statute with that standard was "constitutionally sufficient." 418 U. S., at 123. The decision said nothing about whether it was constitutionally necessary, or instead whether a recklessness standard would suffice as well.

[7]The dissent accuses the Court of making a "Goldilocks judgment" in favoring a recklessness standard. *Post*, at 13 (opinion of BARRETT, J.). But in law, as in life, there are worse things than being "just right."

# SUPREME COURT OF THE UNITED STATES

No. 22–138

BILLY RAYMOND COUNTERMAN, PETITIONER *v.* COLORADO

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF COLORADO

[June 27, 2023]

JUSTICE SOTOMAYOR, with whom JUSTICE GORSUCH joins as to Parts I, II, III–A, and III–B, concurring in part and concurring in the judgment.

When the government seeks to punish speech based on its content, the First Amendment typically imposes stringent requirements. This ensures that the government, even when pursuing compelling objectives, does not unduly burden our Nation's commitment to free expression. "From 1791 to the present, however, the First Amendment has permitted restrictions upon the content of speech in a few limited areas." *United States* v. *Stevens*, 559 U. S. 460, 468 (2010) (internal quotation marks omitted). These categories must be "well-defined and narrowly limited" in light of the serious consequences that flow from carving out speech from ordinary First Amendment protections. *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571 (1942).

"True threats" are one such category, and there is a tradition of criminalizing threats stretching back centuries. This includes punishing single utterances based on the message conveyed. One paradigmatic example of this would be writing and mailing a letter threatening to assassinate the President. Such laws are plainly important. There is no longstanding tradition, however, of punishing speech merely because it is unintentionally threatening.

Instead, this Court's precedent, along with historical statutes and cases, reflect a commonsense understanding that threatening someone is an intentional act. As to what intent is needed, "[t]raditionally, one intends certain consequences when he desires that his acts cause those consequences or knows that those consequences are substantially certain to result from his acts." *Tison* v. *Arizona*, 481 U. S. 137, 150 (1987) (internal quotation marks omitted). This does not require showing that an individual intends to carry through with the threat. But it does require showing that an individual desires to threaten or is substantially certain that her statements will be understood as threatening.

Today, unfortunately, the Court unnecessarily departs from this traditional understanding. That is not to say that I disagree with the Court on everything. Far from it. I join the Court's conclusion that some subjective *mens rea* is required in true-threats cases. I also agree that in this particular case, where petitioner was prosecuted for stalking that involved threatening statements, a *mens rea* of recklessness is amply sufficient. Where I part ways with the Court is that I would not reach the distinct and more complex question whether a *mens rea* of recklessness is sufficient for true-threats prosecutions generally. Further, requiring nothing more than a *mens rea* of recklessness is inconsistent with precedent, history, and the commitment to even harmful speech that the First Amendment enshrines. I therefore respectfully concur only in part and in the judgment.

## I

As an initial matter, I do not believe that this Court should reach the question whether recklessness is sufficient for true-threats prosecutions. A key conceptual distinction is helpful for explaining why. On the one hand, there are statements that are objectively threatening. In some cases, such statements can be punished because they fall into the

unprotected category of "true threats." Yet such statements can also be punished if they fall into another category of unprotected speech, such as speech integral to criminal conduct. Or they might warrant less First Amendment protection for other reasons. On the other hand, there is the question of what constitutes the well-defined and longstanding category of unprotected true threats. It is with this latter question that I do not see the need to address whether a *mens rea* of recklessness is sufficient across the board.

First, the courts below did not address whether recklessness was sufficient to prosecute true threats and neither of the actual parties have advocated a recklessness standard. Colorado disclaimed the idea that recklessness was required, and petitioner asserted, correctly, that recklessness had not been raised under traditional principles of party presentation. The briefing on recklessness consists almost entirely of a few pages of an argument in the alternative at the tail end of an *amicus* brief filed by the United States.

Second, because petitioner was prosecuted for stalking involving threatening speech, this case does not require resort to the true-threats exemption to the First Amendment.

True-threats doctrine covers content-based prosecutions for single utterances of "pure speech," which need not even be communicated to the subject of the threat. *Watts* v. *United States*, 394 U. S. 705, 707 (1969) (*per curiam*). The First Amendment would normally place strict limits on such prosecutions. So there is typically a need to determine whether the speech in question falls within the traditionally unprotected category of true threats.

This is not such a case, however. Petitioner was convicted for "stalking [causing] serious emotional distress" for a combination of threatening statements and repeated, unwanted, direct contact with C. W. 497 P. 3d 1039, 1043

(Colo. App. 2021).[1] This kind of prosecution raises fewer First Amendment concerns for a variety of reasons. Stalking can be carried out through speech but need not be, which requires less First Amendment scrutiny when speech is swept in. See, *e.g.*, *Rumsfeld* v. *Forum for Academic and Institutional Rights, Inc.*, 547 U. S. 47, 62 (2006). The content of the repeated communications can sometimes be irrelevant, such as persistently calling someone and hanging up, or a stream of "utterly prosaic" communications. *Ante*, at 1. Repeatedly forcing intrusive communications directly into the personal life of "an unwilling recipient" also enjoys less protection. *Rowan* v. *Post Office Dept.*, 397 U. S. 728, 738 (1970). Finally, while there is considerable risk with a single intemperate utterance that a speaker will "accidentally or erroneously incur liability," *ante*, at 7 (internal quotation marks and alterations omitted), that risk is far reduced with a course of repeated unwanted contact. Take, for example, petitioner continuously contacting C. W. despite her blocking him.

Given this, prosecuting threatening statements made as part of a course of stalking does not squarely present the hardest questions about the *mens rea* required to prosecute isolated utterances based solely on their content.[2] True-threats doctrine came up below only because of the lower courts' doubtful assumption that petitioner could be prosecuted only if his actions fell under the true-threats exception. I do not think that is accurate, given the lessened

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[1] The statute of conviction applies to someone who "[r]epeatedly follows, approaches, contacts, places under surveillance, or makes any form of communication with another person . . . in a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person . . . serious emotional distress." Colo. Rev. Stat. §18–3–602(1)(c) (2022).

[2] For these reasons, stalking prosecutions that do not rely on the content of communications would raise even fewer First Amendment concerns.

First Amendment concerns at issue. In such cases, recklessness is amply sufficient. And I would stop there. There is simply no need to reach out in this stalking case to determine whether anything more than recklessness is needed for punishing true threats generally.

II

Lest there be any doubt, the First Amendment stakes around the definition of "true threats" are high indeed. The First Amendment's mantle covers speech that is "vituperative, abusive and inexact." *Watts*, 394 U. S., at 708. "It might be tempting to dismiss" seemingly low-value speech "as unworthy of . . . robust First Amendment protections." *Mahanoy Area School Dist.* v. *B. L.*, 594 U. S. ___, ___ (2021) (slip op., at 11). Yet "[m]ost of what we say to one another lacks 'religious, political, scientific, educational, journalistic, historical, or artistic value' (let alone serious value), but it is still sheltered from Government regulation." *Stevens*, 559 U. S., at 479 (emphasis deleted). First Amendment vigilance is especially important when speech is disturbing, frightening, or painful, because the undesirability of such speech will place a heavy thumb in favor of silencing it. In response, the Court has upheld First Amendment rights in the context of gruesome animal cruelty videos, *id.*, at 472; cross burning, *Virginia* v. *Black*, 538 U. S. 343, 347–348 (2003); hateful rhetoric in protests of the funerals of fallen soldiers, *Snyder* v. *Phelps*, 562 U. S. 443, 448–449, 458 (2011); and computer-generated images of child pornography, *Ashcroft* v. *Free Speech Coalition*, 535 U. S. 234, 239–240, 258 (2002).

The risk of overcriminalizing upsetting or frightening speech has only been increased by the internet. Our society's discourse occurs more and more in "the 'vast democratic forums of the Internet' in general, and social media in particular." *Packingham* v. *North Carolina*, 582 U. S. 98,

104 (2017) (citation omitted). "Rapid changes in the dynamics of communication and information transmission" have led to equally rapid and ever-evolving changes "in what society accepts as proper behavior." *Ontario* v. *Quon*, 560 U. S. 746, 759 (2010). Different corners of the internet have considerably different norms around appropriate speech. Online communication can also lack many normal contextual clues, such as who is speaking, tone of voice, and expression. Moreover, it is easy for speech made in a one context to inadvertently reach a larger audience.

Without sufficient protection for unintentionally threatening speech, a high school student who is still learning norms around appropriate language could easily go to prison for sending another student violent music lyrics, or for unreflectingly using language he read in an online forum. "[A] drunken joke" in bad taste can lead to criminal prosecution. *Perez* v. *Florida*, 580 U. S. 1187 (2016) (SOTOMAYOR, J., concurring in denial of certiorari). In the heat of the moment, someone may post an enraged comment under a news story about a controversial topic. Another person might reply equally heatedly. In a Nation that has never been timid about its opinions, political or otherwise, this is commonplace.

Many of this Court's true-threats cases involve such charged political speech. See *Black*, 538 U. S., at 348–349 (Ku Klux Klan rally); *Watts*, 394 U. S., at 707 (antiwar protest); *Rogers* v. *United States*, 422 U. S. 35, 41–42, 47–48 (1975) (Marshall, J., concurring) (opposition to Nixon's policies toward China). *Amici* give further contemporary examples of such speech from across the political spectrum. See, *e.g.*, Brief for American Civil Liberties Union et al. as *Amici Curiae* 24–29. Much of this speech exists in a gray area where it will be quite hard to predict whether a jury would find it threatening. And the ubiquity of such speech raises the possibility of highly discretionary enforcement.

The burdens of overcriminalization will fall hardest on

certain groups. A jury's determination of when angry hyperbole crosses the line will depend on amorphous norms around language, which will vary greatly from one discursive community to another. Juries' decisions will reflect their "background knowledge and media consumption." *Minnesota Voters Alliance* v. *Mansky*, 585 U. S. ___, ___ (2018) (slip op., at 17). "[S]peakers whose ideas or views occupy the fringes of our society have more to fear, for their violent and extreme rhetoric, even if intended simply to convey an idea or express displeasure, is more likely to strike a reasonable person as threatening." *United States* v. *White*, 670 F. 3d 498, 525 (CA4 2012) (Floyd, J., concurring in part and dissenting in part). Members of certain groups, including religious and cultural minorities, can also use language that is more susceptible to being misinterpreted by outsiders. And unfortunately yet predictably, racial and cultural stereotypes can also influence whether speech is perceived as dangerous. See, *e.g.*, A. Dunbar, C. Kubrin, & N. Scurich, The Threatening Nature of "Rap" Music, 22 J. Psychol. Pub. Pol'y & L. 281, 281–282, 288–290 (2016).

On the other hand, the internet has also made stalking and harassment even easier. Stalking can be devastating and dangerous. See Brief for First Amendment Scholars as *Amici Curiae* 7–8. Lives can be ruined, and in the most tragic instances, lives are lost. *Ibid.* Harassers can hide behind online anonymity while tormenting others. This happens in the context of intimate relationships and it happens with strangers. Overly constraining our society's ability to respond to stalking would come at a real cost. For the reasons given, however, a *mens rea* standard for true threats would not hinder stalking prosecutions. See *supra,* at 3–5.

Even isolated threatening speech can do real harm. Such speech not only disrupts lives, it can silence the speech of others who become afraid to speak out. A *mens rea* require-

ment would not, however, present an uncommon or insurmountable barrier to true-threats prosecutions.[3] Nonetheless, under such a standard, there will be some speech that some find threatening that will not and should not land anyone in prison.

## III

These high First Amendment stakes are further reason for caution when delineating the boundaries of what constitutes a true threat. In undertaking that analysis, the Court and I part ways on the order of operations. The Court begins by defining true threats as all objectively threatening speech, entirely independent of whether the speaker intended to be threatening, *ante*, at 6, and the lead dissent agrees, *post*, at 2–3 (opinion of BARRETT, J.). The Court gets there by relying on this Court's interpretation of the word "threat" in a federal statute. *Ante*, at 6 (citing *Elonis* v. *United States*, 575 U. S. 723, 733 (2015)). The Court declares all such speech categorically unprotected, and then asks what "buffer zone" is needed in order to protect other, unthreatening speech. See *ante*, at 4–7.

Respectfully, I see the analysis differently. The first step in the analysis should instead be to ask about the scope of the well-defined and narrow category of "true threats" as a constitutional matter. This Court has already warned about the danger of creating new categories of "unprotected speech" exempt from the ordinary First Amendment framework for balancing our society's commitment to free expression with other interests. *Stevens*, 559 U. S., at 470. If courts were at liberty to redefine what counts as a "threat"

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[3] Intent requirements are common, including for incitement that results in actual violence, not just the threat of it. See *infra*, at 15–17. For that reason there are longstanding frameworks for determining when someone is not guilty by reason of insanity, and when delusions do (and do not) defeat a showing of intent. See, *e.g.*, 1 W. LaFave, Substantive Criminal Law §§7.1(a), (b) (3d ed. 2018); 2 *id.*, §9.2.

or "defamation" at will, this would achieve the same results as creating new categories of unprotected speech.

Thus, the Court must first ask whether there is a long-standing tradition of punishing inadvertent threats as "true threats." This Court's prior definition of the word "threat" in a federal statute, looking primarily to dictionaries, *Elonis*, 575 U. S., at 733, does not tell us the scope of "true threats" for First Amendment purposes. *Elonis* itself made clear that it did "not . . . consider any First Amendment issues." *Id.*, at 740. Instead, a careful examination of this Court's true-threats precedent and the history of threat crimes does not support a long-settled tradition of punishing inadvertently threatening speech.

A

A natural place to begin, one might think, would be with this Court's most recent decision involving the First Amendment, *mens rea*, and true threats. Yet to read the Court's decision, one would have little idea that in a seminal 2003 decision, this Court held that a threat conviction could not stand because of an insufficient *mens rea* requirement. See *Black*, 538 U. S. 343. *Black* plainly sets out a conception of true threats as including a *mens rea* requirement.

In *Black*, the Court confronted the constitutionality of a Virginia statute that prohibited burning a cross with intent to intimidate. Only part of the decision in *Black* is contained in a five-Justice majority opinion. The other relevant parts of the decision were written by the Members of that majority, who split into a four-Justice plurality and Justice Scalia's partial concurrence in judgment.

The majority explained why a prohibition on cross burning with intent to threaten was constitutional, beginning by defining the category of true threats. "'True threats,'" the majority explained "encompass those statements where the speaker *means to* communicate a serious expression of an

intent to commit an act of unlawful violence." *Id.*, at 359 (emphasis added). However, "[t]he speaker need not actually intend to carry out the threat," as true threats also include intimidation alone. *Id.*, at 359–360. And "[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons *with the intent of* placing the victim in fear of bodily harm or death." *Id.*, at 360 (emphasis added).

To the extent the Virginia statute covered intentionally threatening cross burning, it was thus tailored to cover only true threats. Critically, however, the statute also provided that "'[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate.'" *Id.*, at 348. In other words, the all-important intent requirement could be satisfied by the mere conduct itself.

Consistent with the majority's definition of true threats, both the plurality and Justice Scalia agreed that the lack of a sufficient intent requirement meant that a conviction under the statute could not stand. *Id.*, at 367, 379. For the plurality, the intent requirement was "the very reason why a State may ban cross burning" because it "distinguish[ed]" between the constitutionally unprotected true threat of burning a cross with intent to intimidate and "cross burning [as] a statement of ideology." *Id.*, at 365–366.[4] For Justice Scalia, the "plurality [was] correct in all of this." *Id.*, at 372 (opinion concurring in part, concurring in judgment in part,

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[4] The lead dissent asserts that the *Black* plurality's decision was based on how the statute "'ignore[d] all of the contextual factors that are necessary to decide whether a particular cross burning' was covered by the statute." *Post*, at 9 (opinion of BARRETT, J.) (quoting 538 U. S., at 367 (plurality opinion)). But some context is missing from this reading itself. The full sentence is "all of the contextual factors that are necessary to decide whether a particular cross burning *is intended to intimidate*." *Id.*, at 367 (emphasis added). The plurality was thus concerned with context to the extent it was relevant to the *mens rea* requirement needed to render the statute constitutional. *Id.*, at 365–366.

and dissenting in part). There was a constitutional need for a distinction between cross burning "'intended to intimidate'" and cross burning as "'a statement of ideology.'" *Ibid.* The plurality and Justice Scalia only parted ways as to whether to hold that the statute was "facially invalid," *id.*, at 367 (plurality opinion), or just that the jury instructions made it unclear "whether the jury has rendered its verdict (*as it must*)" with sufficient consideration of "intent to intimidate," *id.*, at 380 (opinion of Scalia, J.) (emphasis added).

The through-line is not hard to discern. First, unprotected true threats include a subjective *mens rea* requirement. *Id.*, at 360 (majority opinion). Second, as a result, "Virginia's statute does not run afoul of the First Amendment insofar as it bans cross burning with intent to intimidate." *Id.*, at 362 (majority opinion). Third, a conviction could not stand if it had categorically dispensed with that intent requirement, *id.*, at 365–366 (plurality opinion), or if the jury had insufficiently considered "intent to intimidate," *id.*, at 380 (opinion of Scalia, J.).

In sum, all five Justices in the *Black* majority agreed that a true-threats prosecution could not stand under the First Amendment without a sufficient subjective *mens rea* requirement.[5]

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[5] According to the Court today and the lead dissent, however, *Black* somehow managed not to say anything about the First Amendment *mens rea* requirement for true-threats prosecutions—while striking down a true-threat conviction under the First Amendment for an insufficient *mens rea* requirement. On this reading, *Black* only discussed intent because "the statute involved in the case required a showing of intent." *Ante*, at 6, n. 3; *post*, at 9, n. 4 (discussion of intent was "a reference to the *statutory* requirements for a conviction, not the *constitutional* requirements"). This puzzling interpretation does not explain why an illusory *mens rea* requirement in a Virginia law would pose any First Amendment problems if the Amendment did not impose a *mens rea* requirement of this kind. After all, "[w]hy would the First Amendment care how a jury goes about finding an [intent] element that is a matter

B

In defining true threats as "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence," *id.*, at 359, the Court in *Black* echoed the traditional understanding of threats. Historically, threat crimes covered the same kind of subjectively threatening speech *Black* invoked.

In reviewing this history, it is also vital to keep in mind the nature of the inquiry. Removing speech from normal First Amendment scrutiny is a major shift in the balance of expression and public interest that our Constitution generally strikes. The inquiry is therefore whether there is a "long-settled tradition" of prohibiting inadvertently threatening speech. *Stevens*, 559 U. S., at 469. None of the other opinions, however, identify a historical case that expressly raised the question whether a subjective *mens rea* is required and held that it is not. That is a remarkable thing when one considers that the sample size consists of decisions from both sides of the Atlantic across centuries.

There was a long tradition of crimes for threatening another person in order to extort them. See, *e.g.*, 1796 N. J. Laws §57, p. 108. Colorado and the United States admit that this core category of threat crimes required intent.

Even beyond that, a subjective *mens rea* remained a key component of threat offenses. An 18th-century English statute made it a capital offense to "knowingly send any letter . . . threatening to kill or murder any of his Majesty's subject or subjects" or to threaten arson. 27 Geo. II, c. 15, in 21 Eng. Stat. at Large 184 (1754). A leading treatise explained that the statute was "levelled against such whose *intention* it was [to] obtain their object by creating terror in

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of indifference to the Amendment?" *United States* v. *Heineman*, 767 F. 3d 970, 980 (CA10 2014). The obvious answer, from *Black*'s reasoning to its holding, is that such a *mens rea* requirement was necessary for the statute to target true threats.

[the victim's] mind." 2 W. Russell & D. Davis, Crimes & Misdemeanors *1845 (emphasis added).

Consistent with this, defendants were convicted of "knowingly, wilfully, and feloniously" sending threatening letters. *Rex* v. *Tyler*, 1 Mood. 428, 168 Eng. Rep. 1330 (1835); *Rex* v. *Paddle*, Russ. & Ry. 484, 168 Eng. Rep. 910 (1822) (indictment for "knowingly, unlawfully, wickedly, and feloniously" sending a threatening letter); see also *King* v. *Girdwood*, 1 Leach 142, 168 Eng. Rep. 173 (1776) (indictment for "feloniously" sending a threatening letter). "'[K]nowingly and wilfully' effecting any result applies to those who know that the acts performed will have that effect, and perform them with the intention that such shall be their operation." 12 American and English Encyclopaedia of Law 522–524 (J. Merrill ed. 1890); see also J. Boag, Imperial Lexicon of the English Language 530 (1850) (defining "felonious" as "with the deliberate purpose to commit a crime").

The necessary *mens rea* could sometimes be inferred from the content of the letter, but could be rebutted by other evidence. See *King* v. *Philipps*, 6 East 464, 475, 102 Eng. Rep. 1365, 1369 (1805). Courts thus considered "the threat intended to be made by the prisoner" and "what he meant by what he had written" in determining whether he had violated the statute. *Regina* v. *Hill*, 5 Cox 233, 235 (Crim. Cas. 1851); see also *King* v. *John and Mary Hammond*, 1 Leach 444, 446, 168 Eng. Rep. 324, 325 (1787) (describing the offense of sending a threatening letter "to the party whose fears the threat it contains was calculated to alarm").

Threat laws in the United States were of a piece. Some state laws about threats expressly required maliciousness. See Me. Rev. Stat., Tit. 12, ch. 154, §26 (1840); 1884 La. Acts No. 64, §1, p. 86. Courts more generally emphasized the importance of a *mens rea* requirement. See, *e.g.*, *State* v. *Benedict*, 11 Vt. 236, 239 (1839). The North Carolina Su-

preme Court, for example, singled out threats as quintessential examples of offenses where it is "necessary" to prove the "*intent* of the particular letter." *State* v. *Murphy*, 84 N. C. 742, 743–744 (1881). And where state statutes may have been silent on intent to threaten, courts read such requirements in. See *Commonwealth* v. *Morton*, 140 Ky. 628, 631, 131 S. W. 506, 507–508 (1910) (letter must be "calculated to alarm, disturb, intimidate, or injure"); see also *State* v. *Stewart*, 90 Mo. 507, 512, 2 S. W. 790, 792 (1887) (jury instruction requiring that "'defendant intended to threaten'").

Leading treatises also explained the importance of *mens rea*. See 25 American and English Encyclopaedia of Law 1071 (C. Williams ed. 1894) (when there is a question as to "whether or not the letter contains the threat alleged, the intent is a question for the jury"); see also 2 R. Anderson, Wharton's Criminal Law and Procedure §803, pp. 659–660 (1957) (threats must be "intended to put the person threatened in fear of bodily harm"); 2 J. Bishop, Commentaries on the Criminal Law §1201, p. 664 (6th ed. 1877) ("The intent, both under the unwritten law and under the statutes, must be evil").

Against that backdrop, I return to the inquiry at hand: whether there is a "long-settled" or "well-established" history of prosecuting inadvertently threatening speech. There is no line of cases or pattern of statutes affirmatively stating that an objective standard is sufficient.

C

Put together, *Black* and the history point to an intent requirement. When *Black* defined and analyzed true threats in terms of intent, there is no reason to think the Court used intent to mean anything less than its traditional definition of purpose or knowledge. See, *e.g.*, *Tison*, 481 U. S., at 150. Nor would a recklessness standard play the necessary role of distinguishing between cross burning that is "'intended

to intimidate' . . . and nonintimidating cross burning [that] cannot be prohibited." 538 U. S., at 372 (opinion of Scalia, J.). Given the violent history of the symbol, it is hard to imagine that any politically motivated cross burning done within view of the public could be carried out without awareness of some risk a reasonable spectator would feel threatened. See *id.*, at 388–391 (THOMAS, J., dissenting). Recklessness, which turns so heavily on an objective person standard, would not have been enough.

As to the history, it is true that over time courts have often used a wide variety of terms to describe mental states. See, *e.g.*, *Morissette* v. *United States*, 342 U. S. 246, 252 (1952). Yet "[t]he element of intent in the criminal law has traditionally been viewed as a bifurcated concept embracing either the specific requirement of purpose or the more general one of knowledge or awareness." *United States* v. *United States Gypsum Co.*, 438 U. S. 422, 445 (1978); see also *Tison*, 481 U. S., at 150; *Carter* v. *United States*, 530 U. S. 255, 270 (2000) (describing "feloniously" as equivalent to "'intent'"). And at the very least, there is no well-settled history showing that it is enough for a defendant to be merely aware of some risk that their statements could be threatening. See, *e.g.*, *Borden* v. *United States*, 593 U. S. ___, ___ (2021) (plurality opinion) (slip op., at 5) (recklessness requires awareness of a level of risk that "need not come anywhere close to a likelihood"). The history is, instead, replete with the enduring and commonsense pairing of threats and intent.

D

The Court, eschewing *Black* and history, instead reaches its result based on the need for a "buffer zone" drawn by analogy to other categories of unprotected speech. *Ante*, at 4. For the reasons above, I do not think we can leap ahead to this question. With that caveat, I agree with the Court that precedent in other areas of unprotected speech and

concerns about chilling support a subjective *mens rea* requirement for true threats. Yet these same chilling concerns only further buttress the conclusion that true threats should be limited to intentionally threatening speech. Indeed, in the concurrence by Justice Marshall that the Court invokes, *ante*, at 9–10, he advocated "requir[ing] proof that the speaker intended his statement to be taken as a threat," based on concerns about punishing "pure speech." *Rogers*, 422 U. S., at 47–48. In determining the appropriate *mens rea*, the Court analogizes to three categories of traditionally unprotected speech: incitement, obscenity, and defamation. None of these warrants expanding the narrow boundaries of true threats.

1

Speech inciting harm is the closest cousin to speech threatening harm. Both incitement and threats put other people at risk, and both "sprin[g] from [Justice] Holmes's 'clear and present danger' test." G. Blakey & B. Murray, Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law, 2002 B. Y. U. L. Rev. 829, 1069 (2002). Like true threats, incitement's scope is defined in terms of both intention and effect, covering speech "[1] intended to produce, and [2] likely to produce, *imminent* disorder." *Hess* v. *Indiana*, 414 U. S. 105, 109 (1973) (*per curiam*).

Despite their similar nature and source, the Court today draws a hard line between the two. Incitement requires "'inten[t].'" *Ante*, at 8. While for threats, the speaker need only be "aware that others could regard his statements as threatening violence and delive[r] them anyway." *Ante*, at 11 (internal quotation marks omitted). The Court justifies this asymmetry by the idea "that incitement to disorder is commonly a hair's-breadth away from political 'advocacy,'" *ante*, at 13, and the lead dissent says much the same, *post*, at 7 (opinion of BARRETT, J.). These opinions offer little basis for distinguishing threats on this ground, as this Court's

own cases show time and again how true-threats prosecutions sweep in political speech. See *Black*, 538 U. S., at 348–349; *Watts*, 394 U. S., at 707 (antiwar protest); *Rogers*, 422 U. S., at 41–42 (Marshall, J., concurring) (opposition to Nixon's policies toward China).[6] Not only that, but incitement itself is often only a hair's-breadth away from threats.

Take the seminal incitement case *NAACP* v. *Claiborne Hardware Co.*, 458 U. S. 886 (1982). During a civil rights boycott, NAACP leader Charles Evers, brother of the murdered civil rights hero Medgar Evers, gave a series of heated speeches. See *id.*, at 898–902. He intoned that "boycott violators would be 'disciplined'" and that "'[i]f we catch any of you going in any of them racist stores, we're gonna break your damn neck.'" *Id.*, at 902. The Court acknowledged that in this charged context, these speeches "might have been understood as inviting an unlawful form of discipline or, at least, as intending to create a fear of violence." *Id.*, at 927. Yet inflammatory and threatening as these speeches were, they did not constitute incitement. That was because "there [was] no evidence—apart from the speeches themselves—that Evers authorized, ratified, or directly threatened acts of violence." *Id.*, at 929. His speeches were thus not "'directed to inciting or producing imminent lawless action'" and he had not "specifically intended to further an unlawful goal." *Id.*, at 925, n. 68, 928.

Under a recklessness rule, *Claiborne* would have come out the other way. So long as Evers had some subjective awareness of some risk that a reasonable person could re-

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[6] Nor is this limited to decisions by this Court. Threats cases sweep in political speech. See, *e.g.*, *State* v. *Taylor*, 379 N. C. 589, 590, 866 S. E. 2d 740, 744 (2021). Incitement cases can sweep in nonpolitical speech. See, *e.g.*, *Rice* v. *Paladin Enterprises, Inc.*, 128 F. 3d 233, 264, n. 11, 267 (CA4 1997). And still other cases show how incitement and threats can often go hand in hand. See, *e.g.*, *State* v. *Caroll*, 456 N. J. Super. 520, 544–545, 196 A. 3d 106, 120–121 (App. Div. 2018).

gard his statements as threatening, that would be sufficient. It would be quite troubling indeed to adopt a rule rendering this Court's admirable defense of the First Amendment wrongly decided. Nor is *Claiborne* the only example. The foundational incitement case, *Brandenburg* v. *Ohio*, 395 U. S. 444 (1969) (*per curiam*), extended First Amendment protections to armed Klan members uttering racial slurs, a warning that "there might have to be some revengeance taken," and plans for a "'four hundred thousand strong'" march in two cities. *Id.*, at 446. Then, as now, there would be at least some risk that a reasonable resident of those cities could feel threatened.

These concrete examples illustrate a more general principle. Speech inciting imminent and dangerous unlawful activity will reasonably be threatening to those who would be harmed by that illegality. In all such cases, whether seminal decisions by this Court or guilty pleas that barely see the inside of a courtroom, the Court's decision effectively downgrades to recklessness the *mens rea* required for incitement of unlawful force; prosecutors could now simply charge such offenses as true threats. This is particularly worrisome because the standard for recklessness decreases the lower the "social utility" of the conduct. 1 W. LaFave, Substantive Criminal Law §5.4(f) (3d ed. 2018). That is a troubling standard for juries in a polarized nation to apply in cases involving heated political speech. This collateral damage can be avoided, however, if intent to threaten is understood as part of a true threat, just like intent to incite is part of incitement.

2

While obscenity is a step further afield of true threats and incitement, examination of this Court's obscenity case law further supports an intent requirement for prosecutions of true threats.

The Constitution "'requires proof of scienter'" in part "'to

compensate for the ambiguities inherent in the definition of obscenity.'" *Hamling* v. *United States*, 418 U. S. 87, 123 (1974). This is in line with this Court's more general observation that "vagueness" of "content-based regulation of speech" is of "special concern" when it comes to "criminal statute[s]." *Reno* v. *American Civil Liberties Union*, 521 U. S. 844, 871–872 (1997).[7]

Specifically, the Court has held that a "knowledge" *mens rea* is sufficient for obscenity: "It is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials." *Hamling*, 418 U. S., at 123. This ensures that "not innocent but *calculated purveyance* of filth . . . is exorcised." *Id.*, at 122 (internal quotation marks omitted). While the Court today asserts that this Court has "never determined the precise *mens rea*" for obscenity, *ante*, at 13, n. 6, the Court has cited a knowledge standard approvingly for half a century, see *Hamling*, 418 U. S., at 123; *Elonis*, 575 U. S., at 739.[8] Applying that standard to threats, the "'calculated

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[7]Analogously, the Court's civil defamation case law recognizes that heightened liability can require a heightened *mens rea*; even as to nonpublic figures, a higher standard must be met for punitive damages in certain cases. See, *e.g.*, *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 349–350 (1974).

[8]The Court has held, however, that recklessness is sufficient for child pornography. See *Osborne* v. *Ohio*, 495 U. S. 103, 115 (1990). This Court has emphasized time and again how child pornography is "a special case" because "[t]he market for child pornography [is] 'intrinsically related' to the underlying abuse" and thus "'an integral part of the production of such materials, an activity illegal throughout the Nation.'" *United States* v. *Stevens,* 559 U. S. 460, 471 (2010) (quoting *New York* v. *Ferber*, 458 U. S. 747, 759, 761 (1982)); see also *Osborne*, 495 U. S., at 110–111. Child pornography, with its integral ties to separate criminal conduct, is not a strong analogue for threats, which can be fleeting statements in total isolation from any other criminality (though it is a stronger analogy to threats as part of an unlawful course of stalking). Yet the Court's decision today puts child pornography on a First Amendment par with

purveyance' of a threat would require that [a defendant] know the threatening nature of his communication." *Id.*, at 739.

The considerations that drove this Court to approve a higher *mens rea* for obscenity apply here as well. With obscenity, the ambiguity comes partly from the reliance on "'contemporary community standards'" to define what is obscene. *Hamling*, 418 U. S., at 129. Such a standard is notoriously amorphous, and will change a great deal between communities and over time. The same chilling concerns apply to true threats. A recklessness standard based on what a reasonable person could find threatening will depend on ever-shifting community norms around language and when heated speech crosses the line from overly aggressive to criminal. See *supra*, at 5–7.[9]

3

Finally, the Court relies heavily upon this Court's framework for defamation. Specifically, the Court analogizes to the "reckless disregard" standard for defamation of public figures or punitive damages for certain claims involving private figures. *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 279–280 (1964).

Yet while civil defamation may be "the best known and best theorized example" of unprotected speech, *ante*, at 8, the same does not go for criminal prosecution of defamation. It is true that this Court in 1964 invalidated a prosecution

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overheated political speech or violent song lyrics.

[9]There is a further safeguard in obscenity cases. Something is obscene if "taken as a whole, [it] lacks serious literary, artistic, political, or scientific value." *Ashcroft* v. *American Civil Liberties Union*, 535 U. S. 564, 574 (2002) (internal quotation marks omitted). An intent requirement can provide a similar safeguard for threats. As *Virginia* v. *Black*, 538 U. S. 343 (2003), explained, requiring intent distinguishes between speech intended to intimidate and speech intended to express a political statement. *Id.*, at 365–366 (plurality opinion); *id.*, at 372 (opinion of Scalia, J.).

for criminal libel for failing to apply the *Sullivan* standard, which covers "only those false statements made with a high degree of awareness of their probable falsity." *Garrison* v. *Louisiana*, 379 U. S. 64, 75 (1964). Yet the Court expressed strong skepticism of the very concept of criminal prosecutions for libel and noted the salutary trend of its "virtual disappearance." *Id.*, at 69–70. The Court approvingly cited the Model Penal Code's recommendation that criminal libel be limited to speech likely to cause a breach of the peace and "calculated" to do so. *Id.*, at 70. This is not a promising theoretical springboard for determining the *mens rea* required to criminalize other speech.

If the Court were correct that the *Sullivan* standard is the appropriate analogy, however, then this standard should guide how to analyze recklessness in true-threats prosecutions. The generic formulation of recklessness requires that an individual disregard a relatively unspecified level of risk that the harm in question will occur. See *Borden*, 593 U. S., at ___ (plurality opinion) (slip op., at 5). Within that potentially broad range, *Sullivan* provides a more definite and demanding level of risk, reflecting the First Amendment concerns at stake. The Court has "made clear that the defendant must have made the false publication with a high degree of awareness of probable falsity or must have entertained serious doubts as to the truth." *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U. S. 657, 667 (1989) (internal quotation marks and ellipsis omitted). This makes sense. Allowing liability for awareness of a small chance that a story may be false would undermine the very shield *Sullivan* erects.

For similar reasons, after today's ruling, future courts grappling with how to articulate the appropriate level of recklessness in true-threats cases would be well served to consult the *Sullivan* standard. The equivalent to *Sullivan* for true threats would require a high degree of awareness that a statement was probably threatening or serious

doubts as to the threatening nature of the statement. This could avoid the chilling that would arise from a more amorphous and easily satisfied standard.

4

This Court's various frameworks for unprotected speech do not speak with one voice, as perhaps befits the First Amendment. The above survey does not, however, give reason to depart from the traditional understanding of true threats. To the contrary, this case law supports keeping true threats within their traditional bounds. Incitement similarly requires intent. The same chilling concerns that have led this Court to approve a knowledge requirement for obscenity are present with true threats. And to the extent the civil defamation context is relevant, at the very least, it points to a precise and demanding form of recklessness.[10]

IV

Maintaining true threats doctrine within its traditional boundaries will guard against the overcriminalization of a wide range of political, artistic, and everyday speech based

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[10]The lead dissent headlines its analysis by pointing to this Court's case law on "fighting words." *Post*, at 3–4 (opinion of BARRETT, J.). This is an unlikely candidate for a broader theory of the First Amendment. For "nearly three-quarters of a century . . . the Court has never . . . upheld a fighting words conviction" and "[t]he cumulative impact of [the Court's] decisions is to make it unlikely that a fighting words law could survive." E. Chemerinsky, The First Amendment 1094 (6th ed. 2019). It is not hard to see why such convictions would be unlikely to pass First Amendment muster; the leading case involved a Jehovah's Witness distributing literature who was arrested for breach of the peace for calling a public official a "'damned Fascist.'" *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 569, 573–574 (1942). Drawing upon a conviction like the one in *Chaplinksy* as the proper model for criminalizing political speech is proof itself of the serious risks with the lead dissent's approach. In any event, as to the question at hand, when such breach of the peace offenses involved threats, intent to threaten was required. See 2 R. Anderson, Wharton's Criminal Law and Procedure §803, pp. 659–660 (1957).

on its content alone. This does not mean that unintentionally threatening communications are exempt from regulation, far from it. As explained above, there are far fewer First Amendment concerns with stalking laws that punish repeated, targeted, unwanted conduct and accompanying speech. For that reason, recklessness is quite sufficient. As to true threats, intent is neither an unusual nor an insurmountable bar. "[C]ourts and juries every day pass upon knowledge, belief and intent . . . having before them no more than evidence of . . . words and conduct, from which, in ordinary human experience, mental condition can be inferred." *American Communications Assn.* v. *Douds*, 339 U. S. 382, 411 (1950).

* * *

I agree with the Court's conclusion that the First Amendment requires a subjective *mens rea* in true-threats cases, and I also agree that recklessness is amply sufficient for this case. Yet I would stop there, leaving for another day the question of the specific *mens rea* required to prosecute true threats generally. If that question is reached, however, the answer is that true threats encompass a narrow band of intentional threats. Especially in a climate of intense polarization, it is dangerous to allow criminal prosecutions for heated words based solely on an amorphous recklessness standard. Our society has often concluded that an intent standard sets a proper balance between safety and the need for a guilty mind, even in cases that do not involve the First Amendment. Surely when the power of the State is called upon to imprison someone based on the content of their words alone, this standard cannot be considered excessive. Because I part ways with the Court on this score, I respectfully concur only in part and in the judgment.

# SUPREME COURT OF THE UNITED STATES

No. 22–138

BILLY RAYMOND COUNTERMAN, PETITIONER *v.* COLORADO

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF COLORADO

[June 27, 2023]

JUSTICE THOMAS, dissenting.

I join JUSTICE BARRETT's dissent in full. I write separately to address the majority's surprising and misplaced reliance on *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964). In *New York Times*, this Court held that the First Amendment bars public figures from recovering damages for defamation unless they can show that the statement at issue was made with "'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.*, at 280. Like the majority's decision today, "*New York Times* and the Court's decisions extending it were policy-driven decisions masquerading as constitutional law." *McKee* v. *Cosby*, 586 U. S. ___, ___ (2019) (THOMAS, J., concurring in denial of certiorari) (slip op., at 2). Instead of simply applying the First Amendment as it was understood at the time of the Founding, "the Court fashioned its own '"federal rule[s]"' by balancing the 'competing values at stake in defamation suits.'" *Ibid.* (quoting *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 334, 348 (1974)); see also *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485, 501–502 (1984) (acknowledging that "the rule enunciated in the *New York Times* case" is "largely a judge-made rule of law," the "content" of which is "given meaning through the evolutionary process of common-law adjudication"). "The constitutional libel rules adopted by

this Court in *New York Times* and its progeny broke sharply from the common law of libel, and there are sound reasons to question whether the First and Fourteenth Amendments displaced this body of common law." *McKee*, 586 U. S., at ___ (opinion of THOMAS, J.) (slip op., at 6). Thus, as I have previously noted, "[w]e should reconsider our jurisprudence in this area." *Id.*, at ___ (slip op., at 14); see also *Berisha* v. *Lawson*, 594 U. S. ___ (2021) (THOMAS, J., dissenting from denial of certiorari).

I am far from alone. Many Members of this Court have questioned the soundness of *New York Times* and its numerous extensions. See, *e.g.*, *Berisha*, 594 U. S., at ___–___ (GORSUCH, J., dissenting from denial of certiorari) (slip op., at 5–8); *Coughlin* v. *Westinghouse Broadcasting & Cable, Inc.*, 476 U. S. 1187 (1986) (Burger, C. J., joined by Rehnquist, J., dissenting from denial of certiorari); *Gertz*, 418 U. S., at 370 (White, J., dissenting); *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29, 62 (1971) (Harlan, J., dissenting); *id.*, at 78 (Marshall, J., dissenting); *Rosenblatt* v. *Baer*, 383 U. S. 75, 92 (1966) (Stewart, J., concurring); see also E. Kagan, A Libel Story: *Sullivan* Then and Now, 18 L. & Soc. Inquiry 197, 207 (1993); J. Lewis & B. Ottley, *New York Times v. Sullivan* at 50, 64 DePaul L. Rev. 1, 35–36 (2014) (collecting statements from Justice Scalia); cf. *Tah* v. *Global Witness Publishing, Inc.*, 991 F. 3d 231, 251–256 (CADC 2021) (Silberman, J., dissenting in part) (questioning the doctrine). It is thus unfortunate that the majority chooses not only to prominently and uncritically invoke *New York Times*, but also to extend its flawed, policy-driven First Amendment analysis to true threats, a separate area of this Court's jurisprudence.

# SUPREME COURT OF THE UNITED STATES

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF COLORADO

[June 27, 2023]

JUSTICE BARRETT, with whom JUSTICE THOMAS joins, dissenting.

Billy Counterman was convicted under a Colorado law that prohibits true threats. As everyone agrees, the statute requires that the speaker understand the meaning of his words. *Ante*, at 4, n. 1. The question is what more the First Amendment requires. Colorado maintains that an *objective* standard is enough—that is, the government must show that a reasonable person would regard the statement as a threat of violence. Counterman, however, argues that the First Amendment requires a *subjective* test—that is, the speaker himself must intend or know the threatening nature of the statement.

It should be easy to choose between these positions. True threats do not enjoy First Amendment protection, and nearly every other category of unprotected speech may be restricted using an objective standard. Nonetheless, the Court adopts a subjective standard, though not quite the one advanced by Counterman. The Court holds that speakers must recklessly disregard the threatening nature of their speech to lose constitutional protection. Because this unjustifiably grants true threats preferential treatment, I respectfully dissent.

## I

Since the founding, the First Amendment has allowed the government to regulate certain "areas of speech" "because of their constitutionally proscribable content." *R. A. V.* v. *St. Paul*, 505 U. S. 377, 382–383 (1992) (emphasis deleted). This includes true threats, which are "serious expression[s] of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia* v. *Black*, 538 U. S. 343, 359 (2003); see also *R. A. V.*, 505 U. S., at 388 ("[T]hreats of violence are outside the First Amendment"). True threats carry little value and impose great cost. See *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572 (1942) ("[A]ny benefit that may be derived from [true threats] is clearly outweighed by the social interest in order and morality"). "[B]y their very utterance," true threats "inflict injury." *Ibid.* They provoke "the fear of violence," create "disruption," give rise to "the possibility that the threatened violence will occur"—and the list goes on. *Black*, 538 U. S., at 360 (internal quotation marks omitted).[1]

The nature of a true threat points to an objective test for determining the scope of First Amendment protection: Neither its "social value" nor its potential for "injury" depends on the speaker's subjective intent. *Chaplinsky*, 315 U. S., at 572. They can relate, of course—a speaker who does not intend to threaten is less likely to utter a statement that could be taken that way. But the Constitution ultimately declines to protect true threats for objective reasons, not

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[1] Indeed, the Colorado Legislature considered these very harms when it enacted the statute at issue here. The statutory findings explain that stalking, harassment, and threats have "an immediate and long-lasting impact on quality of life as well as risks to security and safety of the victim and persons close to the victim." Colo. Rev. Stat. §§18–3–601(1)(f), 18–3–602(1) (2022). So the legislature passed the statute to "encourag[e] and authoriz[e] effective intervention" before the covered conduct could "escalate into behavior that has even more serious consequences." §18–3–601(2).

subjective ones. So an objective test "complements the explanation for excluding threats of violence from First Amendment protection in the first place." *United States* v. *Jeffries*, 692 F. 3d 473, 480 (CA6 2012).

II

The Court agrees that "[t]he existence of a threat depends not on 'the mental state of the author,' but on 'what the statement conveys' to the person on the other end." *Ante*, at 6. And it acknowledges that "[w]hen the statement is understood as a true threat, all the harms that have long made threats unprotected naturally follow." *Ibid.* Nonetheless, the Court holds Colorado's statute unconstitutional. Why? Because the Court installs a prophylactic buffer zone to avoid chilling protected speech—a buffer zone that protects true threats unless the speaker "consciously disregarded a substantial risk that his communications would be viewed as threatening violence." *Ante*, at 1, 4–5. That reasoning is flawed.

A

The Court's first error is awarding true threats "pride of place among unprotected speech." *Elonis* v. *United States*, 575 U. S. 723, 767 (2015) (THOMAS, J., dissenting). We have held that nearly every category of unprotected speech may be regulated using an objective test. In concluding otherwise, the Court neglects certain cases and misreads others.

Start with fighting words—a category of unprotected speech that the Court skips past. Fighting words are "personally abusive epithets" that are "inherently likely to provoke violent reaction." *Cohen* v. *California*, 403 U. S. 15, 20 (1971). Under our precedent, legislatures may regulate fighting words even when the speaker does not intend to provoke the listener (or does not recklessly disregard that possibility). *Chaplinsky*, 315 U. S., at 572–573 (rejecting First Amendment challenge to a state law punishing

"fighting words" according to a reasonable-person standard); *Cantwell* v. *Connecticut*, 310 U. S. 296, 309–310 (1940) (statements unprotected when they are "likely to provoke violence and disturbance of good order, even though no such eventuality be intended"). Instead, we ask only whether "the ordinary citizen," using her "common knowledge," would reasonably understand the statement as a "direct personal insult." *Cohen*, 403 U. S., at 20; see also *Texas* v. *Johnson*, 491 U. S. 397, 409 (1989).

The Court similarly overlooks the category of "false, deceptive, or misleading" commercial speech. *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626, 638 (1985); *In re R. M. J.*, 455 U. S. 191, 203 (1982) ("Truthful advertising . . . is entitled to the protections of the First Amendment," but "[m]isleading advertising may be prohibited entirely"); *Ibanez* v. *Florida Dept. of Business and Professional Regulation, Bd. of Accountancy*, 512 U. S. 136, 142 (1994) ("[F]alse, deceptive, or misleading commercial speech may be banned"). Here, too, our cases suggest that First Amendment protection depends on objective falsity rather than the speaker's intention. See *In re R. M. J.*, 455 U. S., at 202 ("[R]egulation—and imposition of discipline—are permissible where the particular advertising is *inherently likely to deceive* or where the record indicates that a particular form or method of advertising has *in fact been deceptive*" (emphasis added)); see also *Milavetz, Gallop & Milavetz, P. A.* v. *United States*, 559 U. S. 229, 250–253 (2010). Thus, the government is "free to prevent the dissemination of commercial speech that is false, deceptive, or misleading," without regard to whether the speaker knew that the recipient would be deceived or misled. *Zauderer*, 471 U. S., at 638.

Or take obscenity, which we have long held is "not protected by the freedoms of speech and press." *Roth* v. *United States*, 354 U. S. 476, 481 (1957). Speech qualifies as ob-

scene if the "'average person, applying contemporary community standards,'" would conclude that "the work, taken as a whole, appeals to the prurient interest." *Miller* v. *California*, 413 U. S. 15, 24 (1973). The jury must also make an objective judgment about whether the speech "depicts or describes" sexual conduct "in a patently offensive way," and whether it "lacks serious literary, artistic, political, or scientific value." *Ibid.* The speaker's "'belief as to the obscenity or non-obscenity of the material is irrelevant.'" *Hamling* v. *United States*, 418 U. S. 87, 120–121 (1974). So long as the defendant has "knowledge of the contents of the materials," her speech may be constitutionally regulated. *Id.*, at 123. An objective, reasonable-person standard applies.

In an effort to bolster its position, the Court floats a different standard for obscenity laws, asserting that "the First Amendment demands proof of a defendant's mindset to make out an obscenity case." *Ante*, at 8. By "mindset," the Court apparently means that the defendant must have some awareness that an average person would consider the materials obscene. But the Court draws this conclusion from cases rejecting a *strict liability* standard—for example, we have held that the proprietor of a bookstore cannot be liable for possessing an obscene book unless he knew what was in it. *Smith* v. *California*, 361 U. S. 147, 149, 155 (1959); *Mishkin* v. *New York*, 383 U. S. 502, 510–512 (1966); see also *Ginsberg* v. *New York*, 390 U. S. 629, 643–644 (1968).[2] Knowing what the material depicts is not the same as knowing how the average person would react to it—just

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[2]The Court also cites *Elonis* v. *United States*, *ante*, at 8, 9, n. 4, which Counterman argues puts a "gloss" on obscenity doctrine, Tr. of Oral Arg. 6–7. While *Elonis* briefly discusses the necessary *mens rea* for a conviction under a federal obscenity statute, it does so only in dicta. 575 U. S. 723, 739–740 (2015). *Elonis* does not alter the doctrinal framework for assessing the constitutionality of obscenity laws: That case involves true threats, not obscenity, and it interprets a federal statute, not the Constitution.

as there is an important difference between Counterman's knowledge of what his words meant and his knowledge of how they would be perceived. Though the Court conflates the two, our obscenity cases have repeatedly refused to require the latter as a matter of constitutional law. *Hamling*, 418 U. S., at 120–123; *Rosen* v. *United States*, 161 U. S. 29, 41–42 (1896). So obscenity doctrine does not help Counterman.

The Court leans hardest on defamation law, but its argument depends on a single, cherry-picked strand of the doctrine. Yes, *New York Times Co.* v. *Sullivan* requires public figures and public officials to show "actual malice" on a defamation claim, and we have defined "actual malice" as "knowledge that [the statement] was false" or "reckless disregard of whether it was false or not." 376 U. S. 254, 279–280 (1964). But that is not the full story. A private person need only satisfy an objective standard to recover actual damages for defamation. *Gertz* v. *Robert Welch*, *Inc.*, 418 U. S. 323, 347–350 (1974). And if the defamatory speech does not involve a matter of public concern, she may recover punitive damages with the same showing. *Dun & Bradstreet*, *Inc.* v. *Greenmoss Builders*, *Inc.*, 472 U. S. 749, 760–761 (1985) (plurality opinion). We have justified that distinction on the ground that public-figure defamation claims may deter "would-be critics of official conduct . . . from voicing their criticism," which would "dampe[n] the vigor and limit the variety of public debate." *Sullivan*, 376 U. S., at 279. Not only that, but "the state interest in protecting" public figures is weaker, since they tend to "enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements." *Gertz*, 418 U. S., at 344. So, despite what the Court says, *Sullivan* does not stand for the broad proposition that the First Amendment "demand[s] a subjective mental-state requirement." *Ante*, at 6. Instead, it simply raises the bar for borderline unprotected speech

with high social value (because of its proximity to public discourse) and low potential for injury (because public figures can engage in counterspeech).

*Sullivan*'s rationale does not justify a heightened *mens rea* for true threats. Because true threats are not typically proximate to debate on matters of public concern, the Court's newly erected buffer zone does not serve the end of protecting heated political commentary. Nor can public figures use counterspeech in the public square to protect themselves from serious threats of physical violence. And perversely, private individuals now have less protection from true threats than from defamation—even though they presumably value their lives more than their reputations. See *Gertz*, 418 U. S., at 347–350. The Court has therefore extended *Sullivan* in a way that makes no sense on *Sullivan*'s own terms.

I will give the Court this much: Speakers must specifically intend to incite violence before they lose First Amendment protection. *Brandenburg* v. *Ohio*, 395 U. S. 444, 447 (1969) (*per curiam*) (defining incitement as "advocacy . . . directed to inciting or producing imminent lawless action and likely to incite or produce such action"); see also *Hess* v. *Indiana*, 414 U. S. 105, 108–109 (1973) (*per curiam*). Once more, however, our precedent itself explains the difference. Incitement, as a form of "advocacy," often arises in the political arena. See *Brandenburg*, 395 U. S., at 447 (Ku Klux Klan rally held to plan a "'marc[h] on Congress'"); *Hess*, 414 U. S., at 106 (antiwar demonstration); *Abrams* v. *United States*, 250 U. S. 616, 620 (1919) (pamphlets about the President's "'shameful, cowardly silence about the intervention in Russia'"). A specific intent requirement helps draw the line between incitement and "political rhetoric lying at the core of the First Amendment." *NAACP* v. *Claiborne Hardware Co.*, 458 U. S. 886, 926–927 (1982). The Court does not contend that targeted threats and political commentary share a similarly close relationship.

In sum, our First Amendment precedent does not set a "baseline ban on an objective standard." *Ante*, at 10. Precedent does more than allow an objective test for true threats; on balance, it affirmatively supports one.

B

The Court's analysis also gives short shrift to how an objective test works in practice. Two key features of true threats already guard against the risk of silencing protected speech. Thus, there is no need to go further and adopt the Court's heightened standard.

First, only a very narrow class of statements satisfies the definition of a true threat. To make a true threat, the speaker must express "an intent to commit *an act of unlawful violence*." *Black*, 538 U. S., at 359 (emphasis added). Speech that is merely "offensive," "'poorly chosen,'" or "unpopular" does not qualify. Brief for Petitioner 31, 36, 42. The statement must also threaten violence "to a particular individual or group of individuals"—not just in general. *Black*, 538 U. S., at 359. These tight guardrails distinguish true threats from public-figure defamation, the model for the Court's rule. While defamatory statements can cover an infinite number of topics, true threats target one: unlawful violence.

Second, the statement must be deemed threatening by a reasonable listener who is familiar with the "entire factual context" in which the statement occurs. *State* v. *Taveras*, 342 Conn. 563, 572, 271 A. 3d 123, 129 (2022). This inquiry captures (among other things) the speaker's tone, the audience, the medium for the communication, and the broader exchange in which the statement occurs.[3] Each consideration helps weed out protected speech from true threats.

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[3] Colorado's test provides a good example. Juries must apply the following nonexhaustive factors to determine whether a statement is a true threat: "(1) the statement's role in a broader exchange, if any, including

Our decision in *Black* illustrates the point. There, the Court considered a Virginia law that prohibited cross burning "'with the intent of intimidating any person or group of persons.'" 538 U. S., at 348. Notably, the statute included a presumption: "'Any such burning of a cross shall be prima facie evidence of an intent to intimidate.'" *Ibid.* After three men were convicted under the statute, they challenged it as facially unconstitutional. We upheld the general prohibition on cross burning, concluding that the First Amendment allows the government to ban "a particular type of threat." *Id.*, at 362–363. A plurality then went on to address the statutory presumption. While cross burning "may mean that a person is engaging in constitutionally proscribable intimidation," the plurality reasoned, the act is not monolithic. *Id.*, at 365. Cross burning could be directed "at an individual" or "at a group of like-minded believers"; it could be done "on a neighbor's lawn" or "at a public rally"; it could be done with the property owner's "permission" or without it. *Id.*, at 366. The presumption "blur[red] the line" between these different situations and "ignore[d] all of the contextual factors that are necessary to decide whether a particular cross burning" was covered by the statute or not.[4]

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surrounding events; (2) the medium or platform through which the statement was communicated, including any distinctive conventions or architectural features; (3) the manner in which the statement was conveyed (*e.g.*, anonymously or not, privately or publicly); (4) the relationship between the speaker and recipient(s); and (5) the subjective reaction of the statement's intended or foreseeable recipient(s)." *People in the Interest of R. D.*, 464 P. 3d 717, 721–722 (Colo. 2020).

[4]As JUSTICE SOTOMAYOR emphasizes, *ante*, at 10, n. 4, the plurality said that context informs "whether a particular cross burning is *intended to intimidate*," 538 U. S., at 367 (emphasis added). But this was a reference to the *statutory* requirements for a conviction, not the *constitutional* requirements—the Virginia statute covered only threats made "'with the intent of intimidating any person or group of persons.'" *Id.*, at 348. At no point did the Court hold that the First Amendment demands specific intent; on the contrary, it recognized that a statement made "with the intent of placing the victim in fear of bodily harm or death" is "*a* type of

*Id.*, at 365, 367. Thus, the presumption was unconstitutionally overbroad.

The *Black* plurality's reasoning can be boiled down to the following insight: When context is ignored, true threats cannot be reliably distinguished from protected speech. The reverse also holds: When context is properly considered, constitutional concerns abate. See, *e.g.*, *Watts* v. *United States*, 394 U. S. 705, 708 (1969) (*per curiam*) (concluding that a statement was "political hyperbole" instead of a true threat based on "context," "the expressly conditional nature of the statement," and the "reaction of the listeners").

One more point: Many States have long had statutes like Colorado's on the books. See Brief for Illinois et al. as *Amici Curiae* 16–17. Before we took this case, the vast majority of Courts of Appeals and state high courts had upheld these statutes as constitutional. So objective tests are effectively the status quo today, yet Counterman still struggles to identify past prosecutions that came close to infringing on protected speech. Tr. of Oral Arg. 28–30. The silence is telling.

C

So is the silence in the historical record. Since 1791, true threats have been excluded from the "speech" protected by the First Amendment. *R. A. V.*, 505 U. S., at 382–383, 388. If Counterman could show that a subjective requirement has been inherent in the definition of "true threat" since the founding, he would have a compelling case. But Counterman cannot make that showing.

For starters, he produces no evidence directly addressing the meaning of the First Amendment—nothing from state ratifying conventions, political commentary, or even early debates about efforts to regulate threats in ways that might

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true threat." *Id.*, at 360 (emphasis added).

threaten speech. That is not surprising at the federal level, because the Federal Government did not prohibit threats until the early 20th century. *Elonis*, 575 U. S., at 760 (THOMAS, J., dissenting). Some States, however, both regulated threats and guaranteed the right to free speech in their own constitutions. *Id.*, at 760–761. Yet even at the state level, there was apparently no discussion about the implications of these statutes for the constitutional right.

That void notwithstanding, the state threat statutes are the evidence on which Counterman seizes. He argues that they imposed a subjective *mens rea*, demonstrating that the founding generation thought that threats could be punished on no less. But as JUSTICE THOMAS has already discussed in detail, this is incorrect. See *id.*, at 760–765. Rather than a subjective *mens rea*, these statutes used an objective standard resembling Colorado's.

Even if they did require a heightened *mens rea*, though, these statutes would not carry the day for Counterman. The enactment of a statute against the backdrop of a free speech guarantee tends to show that the legislature thought the statute consistent with that guarantee. Thus, if the question were whether such statutes *violated* the First Amendment, their existence would be evidence to the contrary. But the question here is whether a subjective intent requirement is the constitutional floor. And because the legislature is always free to exceed the floor, the enactment of legislation does not necessarily reflect the legislature's view of the constitutional minimum.

At the end of the day, then, the best historical case for Counterman does not add up to much. He is plainly not asking the Court to enforce a historically sanctioned rule, but rather to fashion a new one.

D

Even if a subjective test had a historical pedigree, the Court's chosen standard of recklessness certainly does not.

Where does recklessness come from? It was not raised by the parties. Only the Solicitor General noted this possibility—and briefly at that. Brief for United States as *Amicus Curiae* 28–31. Nor did the courts below address recklessness; indeed, very few courts (of the many that have taken up the question) have settled on recklessness as the constitutional floor for true threats. See, *e.g.*, *State* v. *Mrozinski*, 971 N. W. 2d 233, 243–245 (Minn. 2022); *In re J. J. M.*, 265 A. 3d 246, 269–270 (Pa. 2021). Still, the Court adopts recklessness as "the right path forward." *Ante*, at 11. Its rationale is, at best, unclear.

The Court begins by acknowledging the "'competing value[s]'" of "free expression" on one hand, and "profound harms . . . to both individuals and society" on the other. *Ante*, at 11–12. But why do these considerations point to recklessness? A knowledge or purpose standard would allow more free expression, so maybe we should go higher. See *ante*, at 16 (SOTOMAYOR, J., concurring in part and concurring in judgment) ("chilling concerns only further buttress the conclusion that true threats should be limited to intentionally threatening speech"). An objective standard would cause less harm to victims, so perhaps lower is better. The optimal balance strikes me as a question best left to the legislature, which could calibrate the *mens rea* to the circumstance—for example, higher for the criminal context and lower for the civil. See Brief for Illinois et al. as *Amici Curiae* 28–30 (States "have a range of policy reasons for using subjective standards for penalizing threats of violence" and many "choose to require proof of a speaker's subjective mental state" in some situations but not others).

Nor does our First Amendment precedent buttress the Court's preferred standard. A recklessness requirement currently applies only to public-figure defamation claims. Incitement to violence calls for more. Fighting words, private-figure defamation, false commercial speech, and obscenity require less. I fail to see why, of all these categories

of unprotected speech, public-figure defamation is the best analog for true threats. The reality is that recklessness is not grounded in law, but in a Goldilocks judgment: Recklessness is not too much, not too little, but instead "just right."

## III

Some may find Colorado's statute harsh, and the Court's decision seems driven in no small part by the heavy hammer of criminal punishment. See *ante*, at 12; *ante*, at 14–15, 20–21 (opinion of SOTOMAYOR, J.). While an objective test is "a familiar feature of civil liability in tort law," the "'conventional requirement for criminal conduct'" is "'*awareness* of some wrongdoing.'" *Elonis*, 575 U. S., at 737–738. In keeping with this convention, we generally presume that "federal criminal statutes that are silent on the required mental state" nonetheless impose the "*mens rea* which is necessary to separate wrongful conduct from otherwise innocent conduct." *Id.*, at 736 (internal quotation marks omitted). That is why we rejected an objective standard for the federal threat prohibition, 18 U. S. C. §875(c). 575 U. S., at 737–739. It is "the threatening nature of the communication" that "makes the conduct 'wrongful'"; thus, the statute is best interpreted to require that the defendant be aware of the impact of his speech. *Id.*, at 737.

But this case is about the scope of the First Amendment, not the interpretation of a criminal statute. Accordingly, the Court's holding affects the *civil* consequences for true threats just as much as it restricts criminal liability. And the civil context underscores the danger of adopting a *Sullivan*-style buffer zone for true threats.

Consider, for example, threat victims who seek restraining orders to protect themselves from their harassers. See, *e.g.*, *United States* v. *Elonis*, 841 F. 3d 589, 593 (CA3 2016) (defendant's wife sought a restraining order after he wrote on Facebook, "I'm not going to rest until your body is a mess,

soaked in blood and dying from all the little cuts"). Civil orders can also keep individuals away from particular geographic areas. Imagine someone who threatens to bomb an airport, *State* v. *Johnston*, 156 Wash. 2d 355, 358–359, 127 P. 3d 707, 708–709 (2006), or "shoot up [a] courthous[e]," *State* v. *Draskovich*, 2017 S. D. 76, ¶3, 904 N. W. 2d 759, 761. The speaker might well end up barred from the location in question—for good reason. Yet after today, such orders cannot be obtained without proof—not necessarily easy to secure—that the person who issued the threat anticipated that it would elicit fear. See Tr. of Oral Arg. 92–93.

The government can also opt to counteract true threats by means of civil enforcement actions. For instance, 18 U. S. C. §248 prohibits "threat[s] of force" against any person "obtaining or providing reproductive health services" or "seeking to exercise the First Amendment right of religious freedom at a place of religious worship." The statute imposes a range of civil penalties, and it allows enforcement suits by both private persons and government officials. See, *e.g.*, *United States* v. *Dillard*, 795 F. 3d 1191, 1196–1197 (CA10 2015) (Government brought §248 action after defendant warned a health provider, "[y]ou will be checking under your car everyday—because maybe today is the day someone places an explosive under it"); *McCullen* v. *Coakley*, 573 U. S. 464, 491 (2014) (noting that several States have similar laws). After today, these civil enforcement actions face a higher constitutional hurdle.

In addition, employers and school administrators often discipline individuals who make true threats. Consider the student who was expelled after "draft[ing] two violent, misogynic, and obscenity-laden rants expressing a desire to molest, rape, and murder" his ex-girlfriend. *Doe* v. *Pulaski Cty. Special School Dist.*, 306 F. 3d 616, 619 (CA8 2002) (en banc). Or the one who was suspended after "'talking about taking a gun to school' to 'shoot everyone he hates.'"

*D. J. M.* v. *Hannibal Public School Dist. No. 60*, 647 F. 3d 754, 758 (CA8 2011); *Lovell* v. *Poway Unified School District*, 90 F. 3d 367, 369, 372–373 (CA9 1996) (similar); *Haughwout* v. *Tordenti*, 332 Conn. 559, 561–562, 211 A. 3d 1, 3–4 (2019) (similar). True threats can also be expressed by a parent, a teacher, or an employee in another context altogether. See, *e.g.*, *Taveras*, 342 Conn., at 567–569, 578, 271 A. 3d, at 126–128, 133 (parent); *Smith* v. *New York City Dept. of Ed.*, 109 App. Div. 3d 701, 702–703, 972 N. Y. S. 2d 221, 222 (2013) (teacher); *Diggs* v. *St. Louis*, 613 S. W. 3d 858, 862, 864 (Mo. App. 2020) (correctional officer).

Barring some reason why the speech receives lesser constitutional protection, *e.g.*, *Mahanoy Area School Dist.* v. *B. L.*, 594 U. S. ___, ___–___ (2021) (slip op., at 4–5), the Court's new rule applies to all of these situations. That can make all the difference in some cases. A delusional speaker may lack awareness of the threatening nature of her speech; a devious speaker may strategically disclaim such awareness; and a lucky speaker may leave behind no evidence of mental state for the government to use against her. The Court's decision thus sweeps much further than it lets on.

* * *

The bottom line is this: Counterman communicated true threats, which, "everyone agrees, lie outside the bounds of the First Amendment's protection." *Ante*, at 4. He knew what the words meant. Those threats caused the victim to fear for her life, and they "upended her daily existence." *Ante*, at 2. Nonetheless, the Court concludes that Counterman can prevail on a First Amendment defense. Nothing in the Constitution compels that result. I respectfully dissent.

Syllabus

# DAVIS, AS NEXT FRIEND OF LASHONDA D. *v.* MONROE COUNTY BOARD OF EDUCATION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 97-843. Argued January 12, 1999—Decided May 24, 1999

Petitioner filed suit against respondents, a county school board (Board) and school officials, seeking damages for the sexual harassment of her daughter LaShonda by G. F., a fifth-grade classmate at a public elementary school. Among other things, petitioner alleged that respondents' deliberate indifference to G. F.'s persistent sexual advances toward LaShonda created an intimidating, hostile, offensive, and abusive school environment that violated Title IX of the Education Amendments of 1972, which, in relevant part, prohibits a student from being "excluded from participation in, be[ing] denied the benefits of, or be[ing] subjected to discrimination under any education program or activity receiving Federal financial assistance," 20 U. S. C. § 1681(a). In granting respondents' motion to dismiss, the Federal District Court found that "student-on-student," or peer, harassment provides no ground for a Title IX private cause of action for damages. The en banc Eleventh Circuit affirmed.

*Held:*

1. A private Title IX damages action may lie against a school board in cases of student-on-student harassment, but only where the funding recipient is deliberately indifferent to sexual harassment, of which the recipient has actual knowledge, and that harassment is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school. Pp. 638–653.

(a) An implied private right of action for money damages exists under Title IX, *Franklin* v. *Gwinnett County Public Schools*, 503 U. S. 60, where funding recipients had adequate notice that they could be liable for the conduct at issue, *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 17, but a recipient is liable only for its own misconduct. Here, petitioner attempts to hold the Board liable for its *own* decision to remain idle in the face of known student-on-student harassment in its schools. The standard set out in *Gebser* v. *Lago Vista Independent School Dist.*, 524 U. S. 274—that a school district may be liable for damages under Title IX where it is deliberately indifferent to known acts of teacher-student sexual harassment—also applies in cases

of student-on-student harassment. Initially, in *Gebser*, this Court expressly rejected the use of agency principles to impute liability to the district for the acts of its teachers. *Id.*, at 283. Additionally, Title IX's regulatory scheme has long provided funding recipients with notice that they may be liable for their failure to respond to nonagents' discriminatory acts. The common law has also put schools on notice that they may be held responsible under state law for failing to protect students from third parties' tortious acts. Of course, the harasser's identity is not irrelevant. Deliberate indifference makes sense as a direct liability theory only where the recipient has the authority to take remedial action, and Title IX's language itself narrowly circumscribes the circumstances giving rise to damages liability under the statute. If a recipient does not engage in harassment directly, it may not be liable for damages unless its deliberate indifference "subject[s]" its students to harassment, *i. e.*, at a minimum, causes students to undergo harassment or makes them liable or vulnerable to it. Moreover, because the harassment must occur "under" "the operations of" a recipient, 20 U. S. C. §§ 1681(a), 1687, the harassment must take place in a context subject to the school district's control. These factors combine to limit a recipient's damages liability to circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs. Where, as here, the misconduct occurs during school hours on school grounds, misconduct is taking place "under" an "operation" of the recipient. In these circumstances, the recipient retains substantial control over the context in which the harassment occurs. More importantly, in this setting, the Board exercises significant control over the harasser, for it has disciplinary authority over its students. At the time of the events here, a publication for school attorneys and administrators indicated that student-on-student harassment could trigger Title IX liability, and subsequent Department of Education policy guidelines provide that such harassment falls within Title IX's scope. Contrary to contentions of respondents and the dissent, school administrators will continue to enjoy the flexibility they require in making disciplinary decisions so long as funding recipients are deemed "deliberately indifferent" to acts of student-on-student harassment only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances. Pp. 639–649.

(b) The requirement that recipients receive adequate notice of Title IX's proscriptions also bears on the proper definition of "discrimination" in a private damages action. Title IX proscribes sexual harassment with sufficient clarity to satisfy *Pennhurst*'s notice requirement and serve as a basis for a damages action. See *Gebser*, *supra*, at 281. Having previously held that such harassment is "discrimination" in the

school context under Title IX, this Court is constrained to conclude that student-on-student sexual harassment, if sufficiently severe, can likewise rise to the level of "discrimination" actionable under the statute. The statute's other prohibitions help to give content to "discrimination" in this context. The statute not only protects students from discrimination but also shields them from being "excluded from participation in" or "denied the benefits of" a recipient's "education program or activity" on the basis of gender. 20 U. S. C. § 1681(a). It is not necessary to show an overt, physical deprivation of access to school resources to make out a damages claim for sexual harassment under Title IX, but a plaintiff must show harassment that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victims are effectively denied equal access to an institution's resources and opportunities. Cf. *Meritor Savings Bank, FSB* v. *Vinson*, 477 U. S. 57, 67. Whether gender-oriented conduct is harassment depends on a constellation of surrounding circumstances, expectations, and relationships, *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U. S. 75, 82, including, but not limited to, the harasser's and victim's ages and the number of persons involved. Courts must also bear in mind that schoolchildren may regularly interact in ways that would be unacceptable among adults. Moreover, that the discrimination must occur "under any education program or activity" suggests that the behavior must be serious enough to have the systemic effect of denying the victim equal access to an education program or activity. A single instance of severe one-on-one peer harassment could, in theory, be said to have such a systemic effect, but it is unlikely that Congress would have thought so. The fact that it was a teacher who engaged in harassment in *Franklin* and *Gebser* is relevant. Peer harassment is less likely to satisfy the requirements that the misconduct breach Title IX's guarantee of equal access to educational benefits and have a systemic effect on a program or activity. Pp. 649–653.

2. Applying this standard to the facts at issue, the Eleventh Circuit erred in dismissing petitioner's complaint. This Court cannot say beyond doubt that she can prove no set of facts that would entitle her to relief. She alleges that LaShonda was the victim of repeated acts of harassment by G. F. over a 5-month period, and allegations support the conclusion that his misconduct was severe, pervasive, and objectively offensive. Moreover, the complaint alleges that multiple victims of G. F.'s misconduct sought an audience with the school principal and that the harassment had a concrete, negative effect on LaShonda's ability to receive an education. The complaint also suggests that petitioner may be able to show both actual knowledge and deliberate indifference

on the part of the Board, which made no effort either to investigate or to put an end to the harassment. Pp. 653–654.

120 F. 3d 1390, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined. KENNEDY, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA and THOMAS, JJ., joined, *post*, p. 654.

*Verna L. Williams* argued the cause for petitioner. With her on the briefs were *Marcia D. Greenberger, Leslie T. Annexstein, Nancy Perkins,* and *Stevenson Munro.*

*Deputy Solicitor General Underwood* argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were *Solicitor General Waxman, Acting Assistant Attorney General Lee, Beth S. Brinkmann, Dennis J. Dimsey,* and *Linda F. Thome.*

*W. Warren Plowden, Jr.*, argued the cause and filed a brief for respondents.*

JUSTICE O'CONNOR delivered the opinion of the Court.

Petitioner brought suit against the Monroe County Board of Education and other defendants, alleging that her fifth-grade daughter had been the victim of sexual harassment by another student in her class. Among petitioner's claims was a claim for monetary and injunctive relief under Title IX of

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by *Sara L. Mandelbaum* and *Steven R. Shapiro;* for the National Education Association et al. by *Judith L. Lichtman* and *Donna R. Lenhoff;* for the NOW Legal Defense and Education Fund et al. by *Martha F. Davis, Julie Goldscheid, Yolanda S. Wu, David S. Ettinger,* and *Mary-Christine Sungaila;* and for the Rutherford Institute by *John W. Whitehead* and *Steven H. Aden.*

Briefs of *amici curiae* urging affirmance were filed for the National School Boards Association et al. by *Lisa A. Brown, Jennifer Jacobs,* and *Julie Underwood;* and for Students for Individual Liberty et al. by *James A. Moody.*

*Richard P. Ward* and *Anita K. Blair* filed a brief for the Independent Women's Forum as *amicus curiae.*

the Education Amendments of 1972 (Title IX), 86 Stat. 373, as amended, 20 U. S. C. § 1681 *et seq.* The District Court dismissed petitioner's Title IX claim on the ground that "student-on-student," or peer, harassment provides no ground for a private cause of action under the statute. The Court of Appeals for the Eleventh Circuit, sitting en banc, affirmed. We consider here whether a private damages action may lie against the school board in cases of student-on-student harassment. We conclude that it may, but only where the funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities. Moreover, we conclude that such an action will lie only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit.

I

Petitioner's Title IX claim was dismissed under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief could be granted. Accordingly, in reviewing the legal sufficiency of petitioner's cause of action, "we must assume the truth of the material facts as alleged in the complaint." *Summit Health, Ltd.* v. *Pinhas,* 500 U. S. 322, 325 (1991).

A

Petitioner's minor daughter, LaShonda, was allegedly the victim of a prolonged pattern of sexual harassment by one of her fifth-grade classmates at Hubbard Elementary School, a public school in Monroe County, Georgia. According to petitioner's complaint, the harassment began in December 1992, when the classmate, G. F., attempted to touch LaShonda's breasts and genital area and made vulgar statements such as "'I want to get in bed with you'" and "'I want to feel your boobs.'" Complaint ¶ 7. Similar conduct allegedly occurred on or about January 4 and January 20, 1993. *Ibid.* LaShonda reported each of these incidents to her

mother and to her classroom teacher, Diane Fort. *Ibid.* Petitioner, in turn, also contacted Fort, who allegedly assured petitioner that the school principal, Bill Querry, had been informed of the incidents. *Ibid.* Petitioner contends that, notwithstanding these reports, no disciplinary action was taken against G. F. *Id.*, ¶ 16.

G. F.'s conduct allegedly continued for many months. In early February, G. F. purportedly placed a door stop in his pants and proceeded to act in a sexually suggestive manner toward LaShonda during physical education class. *Id.*, ¶ 8. LaShonda reported G. F.'s behavior to her physical education teacher, Whit Maples. *Ibid.* Approximately one week later, G. F. again allegedly engaged in harassing behavior, this time while under the supervision of another classroom teacher, Joyce Pippin. *Id.*, ¶ 9. Again, LaShonda allegedly reported the incident to the teacher, and again petitioner contacted the teacher to follow up. *Ibid.*

Petitioner alleges that G. F. once more directed sexually harassing conduct toward LaShonda in physical education class in early March, and that LaShonda reported the incident to both Maples and Pippen. *Id.*, ¶ 10. In mid-April 1993, G. F. allegedly rubbed his body against LaShonda in the school hallway in what LaShonda considered a sexually suggestive manner, and LaShonda again reported the matter to Fort. *Id.*, ¶ 11.

The string of incidents finally ended in mid-May, when G. F. was charged with, and pleaded guilty to, sexual battery for his misconduct. *Id.*, ¶ 14. The complaint alleges that LaShonda had suffered during the months of harassment, however; specifically, her previously high grades allegedly dropped as she became unable to concentrate on her studies, *id.*, ¶ 15, and, in April 1993, her father discovered that she had written a suicide note, *ibid.* The complaint further alleges that, at one point, LaShonda told petitioner that she "'didn't know how much longer she could keep [G. F.] off her.'" *Id.*, ¶ 12.

Nor was LaShonda G. F.'s only victim; it is alleged that other girls in the class fell prey to G. F.'s conduct. *Id.*, ¶ 16. At one point, in fact, a group composed of LaShonda and other female students tried to speak with Principal Querry about G. F.'s behavior. *Id.*, ¶ 10. According to the complaint, however, a teacher denied the students' request with the statement, "'If [Querry] wants you, he'll call you.'" *Ibid.*

Petitioner alleges that no disciplinary action was taken in response to G. F.'s behavior toward LaShonda. *Id.*, ¶ 16. In addition to her conversations with Fort and Pippen, petitioner alleges that she spoke with Principal Querry in mid-May 1993. When petitioner inquired as to what action the school intended to take against G. F., Querry simply stated, "'I guess I'll have to threaten him a little bit harder.'" *Id.*, ¶ 12. Yet, petitioner alleges, at no point during the many months of his reported misconduct was G. F. disciplined for harassment. *Id.*, ¶ 16. Indeed, Querry allegedly asked petitioner why LaShonda "'was the only one complaining.'" *Id.*, ¶ 12.

Nor, according to the complaint, was any effort made to separate G. F. and LaShonda. *Id.*, ¶ 16. On the contrary, notwithstanding LaShonda's frequent complaints, only after more than three months of reported harassment was she even permitted to change her classroom seat so that she was no longer seated next to G. F. *Id.*, ¶ 13. Moreover, petitioner alleges that, at the time of the events in question, the Monroe County Board of Education (Board) had not instructed its personnel on how to respond to peer sexual harassment and had not established a policy on the issue. *Id.*, ¶ 17.

B

On May 4, 1994, petitioner filed suit in the United States District Court for the Middle District of Georgia against the Board, Charles Dumas, the school district's superintendent, and Principal Querry. The complaint alleged that the Board

is a recipient of federal funding for purposes of Title IX, that "[t]he persistent sexual advances and harassment by the student G. F. upon [LaShonda] interfered with her ability to attend school and perform her studies and activities," and that "[t]he deliberate indifference by Defendants to the unwelcome sexual advances of a student upon LaShonda created an intimidating, hostile, offensive and abus[ive] school environment in violation of Title IX." *Id.*, ¶¶ 27, 28. The complaint sought compensatory and punitive damages, attorney's fees, and injunctive relief. *Id.*, ¶ 32.

The defendants (all respondents here) moved to dismiss petitioner's complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief could be granted, and the District Court granted respondents' motion. See 862 F. Supp. 363, 368 (MD Ga. 1994). With regard to petitioner's claims under Title IX, the court dismissed the claims against individual defendants on the ground that only federally funded educational institutions are subject to liability in private causes of action under Title IX. *Id.*, at 367. As for the Board, the court concluded that Title IX provided no basis for liability absent an allegation "that the Board or an employee of the Board had any role in the harassment." *Ibid.*

Petitioner appealed the District Court's decision dismissing her Title IX claim against the Board, and a panel of the Court of Appeals for the Eleventh Circuit reversed. 74 F. 3d 1186, 1195 (1996). Borrowing from Title VII law, a majority of the panel determined that student-on-student harassment stated a cause of action against the Board under Title IX: "[W]e conclude that as Title VII encompasses a claim for damages due to a sexually hostile working environment created by co-workers and tolerated by the employer, Title IX encompasses a claim for damages due to a sexually hostile educational environment created by a fellow student or students when the supervising authorities knowingly fail to act to eliminate the harassment." *Id.*, at 1193. The

Eleventh Circuit panel recognized that petitioner sought to state a claim based on school "officials' failure to take action to stop the offensive acts of those over whom the officials exercised control," *ibid.*, and the court concluded that petitioner had alleged facts sufficient to support a claim for hostile environment sexual harassment on this theory, *id.*, at 1195.

The Eleventh Circuit granted the Board's motion for rehearing en banc, 91 F. 3d 1418 (1996), and affirmed the District Court's decision to dismiss petitioner's Title IX claim against the Board, 120 F. 3d 1390 (1998). The en banc court relied, primarily, on the theory that Title IX was passed pursuant to Congress' legislative authority under the Constitution's Spending Clause, U. S. Const., Art. I, § 8, cl. 1, and that the statute therefore must provide potential recipients of federal education funding with "unambiguous notice of the conditions they are assuming when they accept" it. 120 F. 3d, at 1399. Title IX, the court reasoned, provides recipients with notice that they must stop their employees from engaging in discriminatory conduct, but the statute fails to provide a recipient with sufficient notice of a duty to prevent student-on-student harassment. *Id.*, at 1401.

Writing in dissent, four judges urged that the statute, by declining to identify the perpetrator of discrimination, encompasses misconduct by third parties: "The identity of the perpetrator is simply irrelevant under the language" of the statute. *Id.*, at 1412 (Barkett, J., dissenting). The plain language, the dissenters reasoned, also provides recipients with sufficient notice that a failure to respond to student-on-student harassment could trigger liability for the district. *Id.*, at 1414.

We granted certiorari, 524 U. S. 980 (1998), in order to resolve a conflict in the Circuits over whether, and under what circumstances, a recipient of federal educational funds can be liable in a private damages action arising from student-on-student sexual harassment, compare 120 F. 3d 1390 (CA11

1998) (case below), and *Rowinsky* v. *Bryan Independent School Dist.*, 80 F. 3d 1006, 1008 (CA5) (holding that private damages action for student-on-student harassment is available under Title IX only where funding recipient responds to these claims differently based on gender of victim), cert. denied, 519 U. S. 861 (1996), with *Doe* v. *University of Illinois*, 138 F. 3d 653, 668 (CA7 1998) (upholding private damages action under Title IX for funding recipient's inadequate response to known student-on-student harassment), vacated and remanded, *post*, p. 1142, *Brzonkala* v. *Virginia Polytechnic Institute and State University*, 132 F. 3d 949, 960–961 (CA4 1997) (same), vacated and District Court decision affirmed en banc, 169 F. 3d 820 (CA4 1999) (not addressing merits of Title IX hostile environment sexual harassment claim and directing District Court to hold this claim in abeyance pending this Court's decision in the instant case), and *Oona, R.-S.-* v. *McCaffrey*, 143 F. 3d 473, 478 (CA9 1998) (rejecting qualified immunity claim and concluding that Title IX duty to respond to student-on-student harassment was clearly established by 1992–1993), cert. denied, *post*, p. 1154. We now reverse.

## II

Title IX provides, with certain exceptions not at issue here, that

> "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U. S. C. § 1681(a).

Congress authorized an administrative enforcement scheme for Title IX. Federal departments or agencies with the authority to provide financial assistance are entrusted to promulgate rules, regulations, and orders to enforce the objectives of § 1681, see § 1682, and these departments or agencies may rely on "any . . . means authorized by law," including

the termination of funding, *ibid.*, to give effect to the statute's restrictions.

There is no dispute here that the Board is a recipient of federal education funding for Title IX purposes. 74 F. 3d, at 1189. Nor do respondents support an argument that student-on-student harassment cannot rise to the level of "discrimination" for purposes of Title IX. Rather, at issue here is the question whether a recipient of federal education funding may be liable for damages under Title IX under any circumstances for discrimination in the form of student-on-student sexual harassment.

A

Petitioner urges that Title IX's plain language compels the conclusion that the statute is intended to bar recipients of federal funding from permitting this form of discrimination in their programs or activities. She emphasizes that the statute prohibits a student from being "*subjected to discrimination* under any education program or activity receiving Federal financial assistance." 20 U. S. C. § 1681(a) (emphasis added). It is Title IX's "unmistakable focus on the benefited class," *Cannon* v. *University of Chicago*, 441 U. S. 677, 691 (1979), rather than the perpetrator, that, in petitioner's view, compels the conclusion that the statute works to protect students from the discriminatory misconduct of their peers.

Here, however, we are asked to do more than define the scope of the behavior that Title IX proscribes. We must determine whether a district's failure to respond to student-on-student harassment in its schools can support a private suit for money damages. See *Gebser* v. *Lago Vista Independent School Dist.*, 524 U. S. 274, 283 (1998) ("In this case, . . . petitioners seek not just to establish a Title IX violation but to recover *damages* . . ."). This Court has indeed recognized an implied private right of action under Title IX, see *Cannon* v. *University of Chicago*, *supra*, and we have held that money damages are available in such suits, *Franklin* v.

*Gwinnett County Public Schools*, 503 U. S. 60 (1992). Because we have repeatedly treated Title IX as legislation enacted pursuant to Congress' authority under the Spending Clause, however, see, *e. g.*, *Gebser* v. *Lago Vista Independent School Dist.*, *supra*, at 287 (Title IX); *Franklin* v. *Gwinnett County Public Schools*, *supra*, at 74–75, and n. 8 (Title IX); see also *Guardians Assn.* v. *Civil Serv. Comm'n of New York City*, 463 U. S. 582, 598–599 (1983) (opinion of White, J.) (Title VI), private damages actions are available only where recipients of federal funding had adequate notice that they could be liable for the conduct at issue. When Congress acts pursuant to its spending power, it generates legislation "much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 17 (1981). In interpreting language in spending legislation, we thus "insis[t] that Congress speak with a clear voice," recognizing that "[t]here can, of course, be no knowing acceptance [of the terms of the putative contract] if a State is unaware of the conditions [imposed by the legislation] or is unable to ascertain what is expected of it." *Ibid.*; see also *id.*, at 24–25.

Invoking *Pennhurst*, respondents urge that Title IX provides no notice that recipients of federal educational funds could be liable in damages for harm arising from student-on-student harassment. Respondents contend, specifically, that the statute only proscribes misconduct by grant recipients, not third parties. Respondents argue, moreover, that it would be contrary to the very purpose of Spending Clause legislation to impose liability on a funding recipient for the misconduct of third parties, over whom recipients exercise little control. See also *Rowinsky* v. *Bryan Independent School Dist.*, 80 F. 3d, at 1013.

We agree with respondents that a recipient of federal funds may be liable in damages under Title IX only for its own misconduct. The recipient itself must "exclud[e] [per-

sons] from participation in, . . . den[y] [persons] the benefits of, or . . . subjec[t] [persons] to discrimination under" its "program[s] or activit[ies]" in order to be liable under Title IX. The Government's enforcement power may only be exercised against the funding recipient, see § 1682, and we have not extended damages liability under Title IX to parties outside the scope of this power. See *National Collegiate Athletic Assn.* v. *Smith*, 525 U. S. 459, 467, n. 5 (1999) (rejecting suggestion "that the private right of action available under . . . § 1681(a) is potentially broader than the Government's enforcement authority"); cf. *Gebser* v. *Lago Vista Independent School Dist.*, *supra*, at 289 ("It would be unsound, we think, for a statute's *express* system of enforcement to require notice to the recipient and an opportunity to come into voluntary compliance while a judicially *implied* system of enforcement permits substantial liability without regard to the recipient's knowledge or its corrective actions upon receiving notice").

We disagree with respondents' assertion, however, that petitioner seeks to hold the Board liable for *G. F.*'s actions instead of its own. Here, petitioner attempts to hold the Board liable for its *own* decision to remain idle in the face of known student-on-student harassment in its schools. In *Gebser*, we concluded that a recipient of federal education funds may be liable in damages under Title IX where it is deliberately indifferent to known acts of sexual harassment by a teacher. In that case, a teacher had entered into a sexual relationship with an eighth-grade student, and the student sought damages under Title IX for the teacher's misconduct. We recognized that the scope of liability in private damages actions under Title IX is circumscribed by *Pennhurst*'s requirement that funding recipients have notice of their potential liability. 524 U. S., at 287–288. Invoking *Pennhurst*, *Guardians Assn.*, and *Franklin*, in *Gebser* we once again required "that 'the receiving entity of federal funds [have] notice that it will be liable for a mone-

tary award'" before subjecting it to damages liability. 524 U. S., at 287 (quoting *Franklin* v. *Gwinnett County Public Schools*, 503 U. S., at 74). We also recognized, however, that this limitation on private damages actions is not a bar to liability where a funding recipient intentionally violates the statute. *Id.*, at 74–75; see also *Guardians Assn.* v. *Civil Serv. Comm'n of New York City, supra,* at 597–598 (opinion of White, J.) (same with respect to Title VI). In particular, we concluded that *Pennhurst* does not bar a private damages action under Title IX where the funding recipient engages in intentional conduct that violates the clear terms of the statute.

Accordingly, we rejected the use of agency principles to impute liability to the district for the misconduct of its teachers. 524 U. S., at 283. Likewise, we declined the invitation to impose liability under what amounted to a negligence standard—holding the district liable for its failure to react to teacher-student harassment of which it knew or *should have* known. *Ibid.* Rather, we concluded that the district could be liable for damages only where the district itself intentionally acted in clear violation of Title IX by remaining deliberately indifferent to acts of teacher-student harassment of which it had actual knowledge. *Id.*, at 290. Contrary to the dissent's suggestion, the misconduct of the teacher in *Gebser* was not "treated as the grant recipient's actions." *Post,* at 661 (opinion of KENNEDY, J.). Liability arose, rather, from "an official decision by the recipient not to remedy the violation." *Gebser* v. *Lago Vista Independent School Dist., supra,* at 290. By employing the "deliberate indifference" theory already used to establish municipal liability under Rev. Stat. § 1979, 42 U. S. C. § 1983, see *Gebser* v. *Lago Vista Independent School Dist., supra,* at 290–291 (citing *Board of Comm'rs of Bryan Cty.* v. *Brown,* 520 U. S. 397 (1997), and *Canton* v. *Harris,* 489 U. S. 378 (1989)), we concluded in *Gebser* that recipients could be liable in damages only where their own deliberate indifference effectively

"cause[d]" the discrimination, 524 U. S., at 291; see also *Canton* v. *Harris*, *supra*, at 385 (recognizing that a municipality will be liable under § 1983 only if "the municipality *itself* causes the constitutional violation at issue" (emphasis in original)). The high standard imposed in *Gebser* sought to eliminate any "risk that the recipient would be liable in damages not for its own official decision but instead for its employees' independent actions." 524 U. S., at 290–291.

*Gebser* thus established that a recipient intentionally violates Title IX, and is subject to a private damages action, where the recipient is deliberately indifferent to known acts of teacher-student discrimination. Indeed, whether viewed as "discrimination" or "subject[ing]" students to discrimination, Title IX "[u]nquestionably . . . placed on [the Board] the duty not" to permit teacher-student harassment in its schools, *Franklin* v. *Gwinnett County Public Schools*, *supra*, at 75, and recipients violate Title IX's plain terms when they remain deliberately indifferent to this form of misconduct.

We consider here whether the misconduct identified in *Gebser*—deliberate indifference to known acts of harassment—amounts to an intentional violation of Title IX, capable of supporting a private damages action, when the harasser is a student rather than a teacher. We conclude that, in certain limited circumstances, it does. As an initial matter, in *Gebser* we expressly rejected the use of agency principles in the Title IX context, noting the textual differences between Title IX and Title VII. 524 U. S., at 283; cf. *Faragher* v. *Boca Raton*, 524 U. S. 775, 791–792 (1998) (invoking agency principles on ground that definition of "employer" in Title VII includes agents of employer); *Meritor Savings Bank, FSB* v. *Vinson*, 477 U. S. 57, 72 (1986) (same). Additionally, the regulatory scheme surrounding Title IX has long provided funding recipients with notice that they may be liable for their failure to respond to the discriminatory acts of certain nonagents. The Department of Education re-

quires recipients to monitor third parties for discrimination in specified circumstances and to refrain from particular forms of interaction with outside entities that are known to discriminate. See, *e. g.*, 34 CFR §§ 106.31(b)(6), 106.31(d), 106.37(a)(2), 106.38(a), 106.51(a)(3) (1998).

The common law, too, has put schools on notice that they may be held responsible under state law for their failure to protect students from the tortious acts of third parties. See Restatement (Second) of Torts § 320, and Comment *a* (1965). In fact, state courts routinely uphold claims alleging that schools have been negligent in failing to protect their students from the torts of their peers. See, *e. g.*, *Rupp* v. *Bryant*, 417 So. 2d 658, 666–667 (Fla. 1982); *Brahatcek* v. *Millard School Dist.*, 202 Neb. 86, 99–100, 273 N. W. 2d 680, 688 (1979); *McLeod* v. *Grant County School Dist. No. 128*, 42 Wash. 2d 316, 320, 255 P. 2d 360, 362–363 (1953).

This is not to say that the identity of the harasser is irrelevant. On the contrary, both the "deliberate indifference" standard and the language of Title IX narrowly circumscribe the set of parties whose known acts of sexual harassment can trigger some duty to respond on the part of funding recipients. Deliberate indifference makes sense as a theory of direct liability under Title IX only where the funding recipient has some control over the alleged harassment. A recipient cannot be directly liable for its indifference where it lacks the authority to take remedial action.

The language of Title IX itself—particularly when viewed in conjunction with the requirement that the recipient have notice of Title IX's prohibitions to be liable for damages—also cabins the range of misconduct that the statute proscribes. The statute's plain language confines the scope of prohibited conduct based on the recipient's degree of control over the harasser and the environment in which the harassment occurs. If a funding recipient does not engage in harassment directly, it may not be liable for damages unless its deliberate indifference "subject[s]" its students to harass-

ment. That is, the deliberate indifference must, at a minimum, "cause [students] to undergo" harassment or "make them liable or vulnerable" to it. Random House Dictionary of the English Language 1415 (1966) (defining "subject" as "to cause to undergo the action of something specified; expose" or "to make liable or vulnerable; lay open; expose"); Webster's Third New International Dictionary 2275 (1961) (defining "subject" as "to cause to undergo or submit to: make submit to a particular action or effect: EXPOSE"). Moreover, because the harassment must occur "under" "the operations of" a funding recipient, see 20 U. S. C. § 1681(a); § 1687 (defining "program or activity"), the harassment must take place in a context subject to the school district's control, Webster's Third New International Dictionary, *supra*, at 2487 (defining "under" as "in or into a condition of subjection, regulation, or subordination"; "subject to the guidance and instruction of"); Random House Dictionary, *supra*, at 1543 (defining "under" as "subject to the authority, direction, or supervision of").

These factors combine to limit a recipient's damages liability to circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs. Only then can the recipient be said to "expose" its students to harassment or "cause" them to undergo it "under" the recipient's programs. We agree with the dissent that these conditions are satisfied most easily and most obviously when the offender is an agent of the recipient. *Post*, at 661. We rejected the use of agency analysis in *Gebser*, however, and we disagree that the term "under" somehow imports an agency requirement into Title IX. See *post*, at 660–661. As noted above, the theory in *Gebser* was that the recipient was *directly* liable for its deliberate indifference to discrimination. See *supra*, at 642–643. Liability in that case did not arise because the "teacher's actions [were] treated" as those of the funding recipient, *post*, at 661; the district was directly liable for its

*own* failure to act. The terms "subjec[t]" and "under" impose limits, but nothing about these terms requires the use of agency principles.

Where, as here, the misconduct occurs during school hours and on school grounds—the bulk of G. F.'s misconduct, in fact, took place in the classroom—the misconduct is taking place "under" an "operation" of the funding recipient. See *Doe* v. *University of Illinois*, 138 F. 3d, at 661 (finding liability where school fails to respond properly to "student-on-student sexual harassment that takes place while the students are involved in school activities or otherwise under the supervision of school employees"). In these circumstances, the recipient retains substantial control over the context in which the harassment occurs. More importantly, however, in this setting the Board exercises significant control over the harasser. We have observed, for example, "that the nature of [the State's] power [over public schoolchildren] is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults." *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. 646, 655 (1995). On more than one occasion, this Court has recognized the importance of school officials' "comprehensive authority . . . , consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503, 507 (1969); see also *New Jersey* v. *T. L. O.*, 469 U. S. 325, 342, n. 9 (1985) ("The maintenance of discipline in the schools requires not only that students be restrained from assaulting one another, abusing drugs and alcohol, and committing other crimes, but also that students conform themselves to the standards of conduct prescribed by school authorities"); 74 F. 3d, at 1193 ("The ability to control and influence behavior exists to an even greater extent in the classroom than in the workplace . . ."). The common law, too, recognizes the school's disciplinary authority. See Restatement (Second) of Torts § 152 (1965). We thus conclude that recipients of federal funding may be liable for "subject[ing]" their students

to discrimination where the recipient is deliberately indifferent to known acts of student-on-student sexual harassment and the harasser is under the school's disciplinary authority.

At the time of the events in question here, in fact, school attorneys and administrators were being told that student-on-student harassment could trigger liability under Title IX. In March 1993, even as the events alleged in petitioner's complaint were unfolding, the National School Boards Association issued a publication, for use by "school attorneys and administrators in understanding the law regarding sexual harassment of employees and students," which observed that districts could be liable under Title IX for their failure to respond to student-on-student harassment. See National School Boards Association Council of School Attorneys, Sexual Harassment in the Schools: Preventing and Defending Against Claims v, 45 (rev. ed.). Drawing on Equal Employment Opportunity Commission guidelines interpreting Title VII, the publication informed districts that, "if [a] school district has constructive notice of severe and repeated acts of sexual harassment by fellow students, that may form the basis of a [T]itle IX claim." *Ibid.* The publication even correctly anticipated a form of *Gebser*'s actual notice requirement: "It is unlikely that courts will hold a school district liable for sexual harassment by students against students in the absence of actual knowledge or notice to district employees." Sexual Harassment in the Schools, *supra*, at 45. Although we do not rely on this publication as an "indicium of congressional notice," see *post*, at 671, we do find support for our reading of Title IX in the fact that school attorneys have rendered an analogous interpretation.

Likewise, although they were promulgated too late to contribute to the Board's notice of proscribed misconduct, the Department of Education's Office for Civil Rights (OCR) has recently adopted policy guidelines providing that student-on-student harassment falls within the scope of Title IX's proscriptions. See Department of Education, Office of Civil

Rights, Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034, 12039–12040 (1997) (OCR Title IX Guidelines); see also Department of Education, Racial Incidents and Harassment Against Students at Educational Institutions, 59 Fed. Reg. 11448, 11449 (1994).

We stress that our conclusion here—that recipients may be liable for their deliberate indifference to known acts of peer sexual harassment—does not mean that recipients can avoid liability only by purging their schools of actionable peer harassment or that administrators must engage in particular disciplinary action. We thus disagree with respondents' contention that, if Title IX provides a cause of action for student-on-student harassment, "nothing short of expulsion of every student accused of misconduct involving sexual overtones would protect school systems from liability or damages." See Brief for Respondents 16; see also 120 F. 3d, at 1402 (Tjoflat, J.) ("[A] school must immediately suspend or expel a student accused of sexual harassment"). Likewise, the dissent erroneously imagines that victims of peer harassment now have a Title IX right to make particular remedial demands. See *post,* at 686 (contemplating that victim could demand new desk assignment). In fact, as we have previously noted, courts should refrain from second-guessing the disciplinary decisions made by school administrators. *New Jersey* v. *T. L. O., supra,* at 342–343, n. 9.

School administrators will continue to enjoy the flexibility they require so long as funding recipients are deemed "deliberately indifferent" to acts of student-on-student harassment only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances. The dissent consistently mischaracterizes this standard to require funding recipients to "remedy" peer harassment, *post,* at 658, 662, 668, 683, and to "ensur[e] that . . . students conform their conduct to" certain rules, *post,* at 666. Title IX imposes no such requirements. On the contrary,

the recipient must merely respond to known peer harassment in a manner that is not clearly unreasonable. This is not a mere "reasonableness" standard, as the dissent assumes. See *post*, at 679. In an appropriate case, there is no reason why courts, on a motion to dismiss, for summary judgment, or for a directed verdict, could not identify a response as not "clearly unreasonable" as a matter of law.

Like the dissent, see *post*, at 664–668, we acknowledge that school administrators shoulder substantial burdens as a result of legal constraints on their disciplinary authority. To the extent that these restrictions arise from federal statutes, Congress can review these burdens with attention to the difficult position in which such legislation may place our Nation's schools. We believe, however, that the standard set out here is sufficiently flexible to account both for the level of disciplinary authority available to the school and for the potential liability arising from certain forms of disciplinary action. A university might not, for example, be expected to exercise the same degree of control over its students that a grade school would enjoy, see *post*, at 666–668, and it would be entirely reasonable for a school to refrain from a form of disciplinary action that would expose it to constitutional or statutory claims.

While it remains to be seen whether petitioner can show that the Board's response to reports of G. F.'s misconduct was clearly unreasonable in light of the known circumstances, petitioner may be able to show that the Board "subject[ed]" LaShonda to discrimination by failing to respond in any way over a period of five months to complaints of G. F.'s in-school misconduct from LaShonda and other female students.

B

The requirement that recipients receive adequate notice of Title IX's proscriptions also bears on the proper definition of "discrimination" in the context of a private damages action. We have elsewhere concluded that sexual harassment is a

form of discrimination for Title IX purposes and that Title IX proscribes harassment with sufficient clarity to satisfy *Pennhurst*'s notice requirement and serve as a basis for a damages action. See *Gebser* v. *Lago Vista Independent School Dist.*, 524 U. S., at 281; *Franklin* v. *Gwinnett County Public Schools*, 503 U. S., at 74–75. Having previously determined that "sexual harassment" is "discrimination" in the school context under Title IX, we are constrained to conclude that student-on-student sexual harassment, if sufficiently severe, can likewise rise to the level of discrimination actionable under the statute. See *Bennett* v. *Kentucky Dept. of Ed.*, 470 U. S. 656, 665–666 (1985) (rejecting claim of insufficient notice under *Pennhurst* where statute made clear that there were some conditions placed on receipt of federal funds, and noting that Congress need not "specifically identif[y] and proscrib[e]" each condition in the legislation). The statute's other prohibitions, moreover, help give content to the term "discrimination" in this context. Students are not only protected from discrimination, but also specifically shielded from being "excluded from participation in" or "denied the benefits of" any "education program or activity receiving Federal financial assistance." § 1681(a). The statute makes clear that, whatever else it prohibits, students must not be denied access to educational benefits and opportunities on the basis of gender. We thus conclude that funding recipients are properly held liable in damages only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.

The most obvious example of student-on-student sexual harassment capable of triggering a damages claim would thus involve the overt, physical deprivation of access to school resources. Consider, for example, a case in which male students physically threaten their female peers every

day, successfully preventing the female students from using a particular school resource—an athletic field or a computer lab, for instance. District administrators are well aware of the daily ritual, yet they deliberately ignore requests for aid from the female students wishing to use the resource. The district's knowing refusal to take any action in response to such behavior would fly in the face of Title IX's core principles, and such deliberate indifference may appropriately be subject to claims for monetary damages. It is not necessary, however, to show physical exclusion to demonstrate that students have been deprived by the actions of another student or students of an educational opportunity on the basis of sex. Rather, a plaintiff must establish sexual harassment of students that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities. Cf. *Meritor Savings Bank, FSB* v. *Vinson*, 477 U. S., at 67.

Whether gender-oriented conduct rises to the level of actionable "harassment" thus "depends on a constellation of surrounding circumstances, expectations, and relationships," *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U. S. 75, 82 (1998), including, but not limited to, the ages of the harasser and the victim and the number of individuals involved, see OCR Title IX Guidelines 12041–12042. Courts, moreover, must bear in mind that schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults. See, *e. g.*, Brief for National School Boards Association et al. as *Amici Curiae* 11 (describing "dizzying array of immature . . . behaviors by students"). Indeed, at least early on, students are still learning how to interact appropriately with their peers. It is thus understandable that, in the school setting, students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students

subjected to it. Damages are not available for simple acts of teasing and name-calling among school children, however, even where these comments target differences in gender. Rather, in the context of student-on-student harassment, damages are available only where the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect.

The dissent fails to appreciate these very real limitations on a funding recipient's liability under Title IX. It is not enough to show, as the dissent would read this opinion to provide, that a student has been "teased," *post,* at 678, or "called . . . offensive names," *post,* at 680. Comparisons to an "overweight child who skips gym class because the other children tease her about her size," the student who "refuses to wear glasses to avoid the taunts of 'four-eyes,'" and "the child who refuses to go to school because the school bully calls him a 'scaredy-cat' at recess," *post,* at 678, are inapposite and misleading. Nor do we contemplate, much less hold, that a mere "decline in grades is enough to survive" a motion to dismiss. *Post,* at 677. The dropoff in LaShonda's grades provides necessary evidence of a potential link between her education and G. F.'s misconduct, but petitioner's ability to state a cognizable claim here depends equally on the alleged persistence and severity of G. F.'s actions, not to mention the Board's alleged knowledge and deliberate indifference. We trust that the dissent's characterization of our opinion will not mislead courts to impose more sweeping liability than we read Title IX to require.

Moreover, the provision that the discrimination occur "under any education program or activity" suggests that the behavior be serious enough to have the systemic effect of denying the victim equal access to an educational program or activity. Although, in theory, a single instance of sufficiently severe one-on-one peer harassment could be said to have such an effect, we think it unlikely that Congress would

have thought such behavior sufficient to rise to this level in light of the inevitability of student misconduct and the amount of litigation that would be invited by entertaining claims of official indifference to a single instance of one-on-one peer harassment. By limiting private damages actions to cases having a systemic effect on educational programs or activities, we reconcile the general principle that Title IX prohibits official indifference to known peer sexual harassment with the practical realities of responding to student behavior, realities that Congress could not have meant to be ignored. Even the dissent suggests that Title IX liability may arise when a funding recipient remains indifferent to severe, gender-based mistreatment played out on a "widespread level" among students. *Post,* at 683.

The fact that it was a teacher who engaged in harassment in *Franklin* and *Gebser* is relevant. The relationship between the harasser and the victim necessarily affects the extent to which the misconduct can be said to breach Title IX's guarantee of equal access to educational benefits and to have a systemic effect on a program or activity. Peer harassment, in particular, is less likely to satisfy these requirements than is teacher-student harassment.

C

Applying this standard to the facts at issue here, we conclude that the Eleventh Circuit erred in dismissing petitioner's complaint. Petitioner alleges that her daughter was the victim of repeated acts of sexual harassment by G. F. over a 5-month period, and there are allegations in support of the conclusion that G. F.'s misconduct was severe, pervasive, and objectively offensive. The harassment was not only verbal; it included numerous acts of objectively offensive touching, and, indeed, G. F. ultimately pleaded guilty to criminal sexual misconduct. Moreover, the complaint alleges that there were multiple victims who were sufficiently disturbed by G. F.'s misconduct to seek an audience with the school prin-

cipal. Further, petitioner contends that the harassment had a concrete, negative effect on her daughter's ability to receive an education. The complaint also suggests that petitioner may be able to show both actual knowledge and deliberate indifference on the part of the Board, which made no effort whatsoever either to investigate or to put an end to the harassment.

On this complaint, we cannot say "beyond doubt that [petitioner] can prove no set of facts in support of [her] claim which would entitle [her] to relief." *Conley* v. *Gibson*, 355 U. S. 41, 45–46 (1957). See also *Scheuer* v. *Rhodes*, 416 U. S. 232, 236 (1974) ("The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims"). Accordingly, the judgment of the United States Court of Appeals for the Eleventh Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE THOMAS join, dissenting.

The Court has held that Congress' power "'to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.'" *South Dakota* v. *Dole*, 483 U. S. 203, 207 (1987) (quoting *United States* v. *Butler*, 297 U. S. 1, 66 (1936)). As a consequence, Congress can use its Spending Clause power to pursue objectives outside of "Article I's 'enumerated legislative fields'" by attaching conditions to the grant of federal funds. 483 U. S., at 207. So understood, the Spending Clause power, if wielded without concern for the federal balance, has the potential to obliterate distinctions between national and local spheres of interest and power by permitting the Federal Government to set pol-

icy in the most sensitive areas of traditional state concern, areas which otherwise would lie outside its reach.

A vital safeguard for the federal balance is the requirement that, when Congress imposes a condition on the States' receipt of federal funds, it "must do so unambiguously." *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 17 (1981). As the majority acknowledges, "legislation enacted pursuant to the spending power is much in the nature of a contract," and the legitimacy of Congress' exercise of its power to condition funding on state compliance with congressional conditions "rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *Ibid.*; see *ante*, at 640. "'There can, of course, be no knowing acceptance [of the terms of the putative contract] if a State is unaware of the conditions [imposed by the legislation] or is unable to ascertain what is expected of it.'" *Ibid.* (quoting *Pennhurst*, 451 U. S., at 17).

Our insistence that "Congress speak with a clear voice" to "enable the States to exercise their choice knowingly, cognizant of the consequences of their participation," *ibid.*, is not based upon some abstract notion of contractual fairness. Rather, it is a concrete safeguard in the federal system. Only if States receive clear notice of the conditions attached to federal funds can they guard against excessive federal intrusion into state affairs and be vigilant in policing the boundaries of federal power. Cf. *Dole*, *supra*, at 217 (O'CONNOR, J., dissenting) ("If the spending power is to be limited only by Congress' notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives 'power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed'" (quoting *Butler*, *supra*, at 78)). While the majority purports to give effect to these principles, it eviscerates the clear-notice safeguard of our Spending Clause jurisprudence.

Title IX provides:

> "No person in the United States shall, on the basis of sex, be [1] excluded from participation in, [2] be denied the benefits of, or [3] be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U. S. C. § 1681(a).

To read the provision in full is to understand what is most striking about its application in this case: Title IX does not by its terms create any private cause of action whatsoever, much less define the circumstances in which money damages are available. The only private cause of action under Title IX is judicially implied. See *Cannon* v. *University of Chicago*, 441 U. S. 677 (1979).

The Court has encountered great difficulty in establishing standards for deciding when to imply a private cause of action under a federal statute which is silent on the subject. We try to conform the judicial judgment to the bounds of likely congressional purpose but, as we observed in *Gebser* v. *Lago Vista Independent School Dist.*, 524 U. S. 274 (1998), defining the scope of the private cause of action in general, and the damages remedy in particular, "inherently entails a degree of speculation, since it addresses an issue on which Congress has not specifically spoken." *Id.*, at 284.

When the statute at issue is a Spending Clause statute, this element of speculation is particularly troubling because it is in significant tension with the requirement that Spending Clause legislation give States clear notice of the consequences of their acceptance of federal funds. Without doubt, the scope of potential damages liability is one of the most significant factors a school would consider in deciding whether to receive federal funds. Accordingly, the Court must not imply a private cause of action for damages unless it can demonstrate that the congressional purpose to create the implied cause of action is so manifest that the State,

when accepting federal funds, had clear notice of the terms and conditions of its monetary liability.

Today the Court fails to heed, or even to acknowledge, these limitations on its authority. The remedial scheme the majority creates today is neither sensible nor faithful to Spending Clause principles. In order to make its case for school liability for peer sexual harassment, the majority must establish that Congress gave grant recipients clear and unambiguous notice that they would be liable in money damages for failure to remedy discriminatory acts of their students. The majority must also demonstrate that the statute gives schools clear notice that one child's harassment of another constitutes "discrimination" on the basis of sex within the meaning of Title IX, and that—as applied to individual cases—the standard for liability will enable the grant recipient to distinguish inappropriate childish behavior from actionable gender discrimination. The majority does not carry these burdens.

Instead, the majority finds statutory clarity where there is none and discovers indicia of congressional notice to the States in the most unusual of places. It treats the issue as one of routine statutory construction alone, and it errs even in this regard. In the end, the majority not only imposes on States liability that was unexpected and unknown, but the contours of which are, as yet, unknowable. The majority's opinion purports to be narrow, but the limiting principles it proposes are illusory. The fence the Court has built is made of little sticks, and it cannot contain the avalanche of liability now set in motion. The potential costs to our schools of today's decision are difficult to estimate, but they are so great that it is most unlikely Congress intended to inflict them.

The only certainty flowing from the majority's decision is that scarce resources will be diverted from educating our children and that many school districts, desperate to avoid Title IX peer harassment suits, will adopt whatever federal code of student conduct and discipline the Department of Ed-

ucation sees fit to impose upon them. The Nation's schoolchildren will learn their first lessons about federalism in classrooms where the Federal Government is the ever-present regulator. The Federal Government will have insinuated itself not only into one of the most traditional areas of state concern but also into one of the most sensitive areas of human affairs. This federal control of the discipline of our Nation's schoolchildren is contrary to our traditions and inconsistent with the sensible administration of our schools. Because Title IX did not give States unambiguous notice that accepting federal funds meant ceding to the Federal Government power over the day-to-day disciplinary decisions of schools, I dissent.

I

I turn to the first difficulty with the majority's decision. Schools cannot be held liable for peer sexual harassment because Title IX does not give them clear and unambiguous notice that they are liable in damages for failure to remedy discrimination by their students. As the majority acknowledges, Title IX prohibits only misconduct by grant recipients, not misconduct by third parties. *Ante,* at 640–641 ("The recipient itself must 'exclud[e] [persons] from participation in, . . . den[y] [persons] the benefits of, or . . . subjec[t] [persons] to discrimination under' its 'program[s] or activit[ies]' in order to be liable under Title IX"). The majority argues, nevertheless, that a school "subjects" its students to discrimination when it knows of peer harassment and fails to respond appropriately.

The mere word "subjected" cannot bear the weight of the majority's argument. As we recognized in *Gebser,* the primary purpose of Title IX is "to prevent recipients of federal financial assistance from using the funds in a discriminatory manner." 524 U. S., at 292. We stressed in *Gebser* that Title IX prevents discrimination by the grant recipient, whether through the acts of its principals or the acts of its agents. See *id.,* at 286 (explaining that Title IX and Title VI

"operate in the same manner, conditioning an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds"). "[W]hereas Title VII aims centrally to compensate victims of discrimination, Title IX focuses more on 'protecting' individuals from discriminatory practices carried out by recipients of federal funds." *Id.*, at 287. The majority does not even attempt to argue that the school's failure to respond to discriminatory acts by students is discrimination by the school itself.

A

In any event, a plaintiff cannot establish a Title IX violation merely by showing that she has been "subjected to discrimination." Rather, a violation of Title IX occurs only if she is "subjected to discrimination under any education program or activity," 20 U. S. C. § 1681(a), where "program or activity" is defined as "all of the operations of" a grant recipient, § 1687.

Under the most natural reading of this provision, discrimination violates Title IX only if it is authorized by, or in accordance with, the actions, activities, or policies of the grant recipient. See Webster's Third New International Dictionary 2487 (1981) (defining "under" as "required by: in accordance with: bound by"); American Heritage Dictionary 1395 (New College ed. 1981) (defining "under" as "[w]ith the authorization of; attested by; by virtue of"); Random House Dictionary of the English Language 2059 (2d ed. 1987) (defining "under" as "authorized, warranted, or attested by" or "in accordance with"); see also 43 Words and Phrases 149–152 (1969) (citing cases defining "under" as, *inter alia*, " 'in accordance with' and 'in conformity with' "; "indicating subjection, guidance or control, and meaning 'by authority of' "; " 'by,' 'by reason of,' or 'by means of' "; and " 'by virtue of,' which is defined . . . as meaning 'by or through the authority of' "). This reading reflects the common legal usage of the

term "under" to mean pursuant to, in accordance with, or as authorized or provided by. See, *e. g., Gregory* v. *Ashcroft*, 501 U. S. 452, 469 (1991) ("Because Congress nowhere stated its intent to impose mandatory obligations on the States under its § 5 powers, we concluded that Congress did not do so"); *ante*, at 632 ("Among petitioner's claims was a claim for monetary and injunctive relief under Title IX . . .").

It is not enough, then, that the alleged discrimination occur in a "context subject to the school district's control." *Ante*, at 645. The discrimination must actually be "controlled by"—that is, be authorized by, pursuant to, or in accordance with, school policy or actions. Compare *ante*, at 645 (defining "under" as "*in* or into *a condition of* subjection, regulation, or subordination" (emphasis added)), with *ibid.* (defining "under" as "*subject to* the guidance and instruction of" (emphasis added)).

This reading is also consistent with the fact that the discrimination must be "under" the "operations" of the grant recipient. The term "operations" connotes active and affirmative participation by the grant recipient, not merely inaction or failure to respond. See Black's Law Dictionary 1092 (6th ed. 1990) (defining "operation" as an "[e]xertion of power; the process of operating or mode of action; an effect brought about in accordance with a definite plan; action; activity").

Teacher sexual harassment of students is "under" the school's program or activity in certain circumstances, but student harassment is not. Our decision in *Gebser* recognizes that a grant recipient acts through its agents and thus, under certain limited circumstances, even tortious acts by teachers may be attributable to the school.' We noted in *Gebser* that, in contrast to Title VII, which defines "employer" to include "any agent"—Title IX "contains no comparable reference to an educational institution's 'agents,' and so does not expressly call for application of agency principles." 524 U. S., at 283. As a result, we declined to incor-

porate principles of agency liability, such as a strict application of vicarious liability, that would conflict with the Spending Clause's notice requirement and Title IX's express administrative enforcement scheme.

Contrary to the majority's assertion, *ante*, at 643, however, we did not abandon agency principles altogether. Rather, we sought in *Gebser* to identify those employee actions which could fairly be attributed to the grant recipient by superimposing additional Spending Clause notice requirements on traditional agency principles. 524 U. S., at 288 ("Title IX contains important clues that Congress did not intend to allow recovery in damages where liability rests solely on principles of vicarious liability or constructive notice"). We concluded that, because of the Spending Clause overlay, a teacher's discrimination is attributable to the school only when the school has actual notice of that harassment and is "deliberately indifferent." The agency relation between the school and the teacher is thus a necessary, but not sufficient, condition of school liability. Where the heightened requirements for attribution are met, the teacher's actions are treated as the grant recipient's actions. In those circumstances, then, the teacher sexual harassment is "under" the operations of the school.

I am aware of no basis in law or fact, however, for attributing the acts of a student to a school and, indeed, the majority does not argue that the school acts through its students. See *ante*, at 641 ("We disagree with respondents' assertion . . . that petitioner seeks to hold the Board liable for *G. F.*'s actions instead of its own. Here, petitioner attempts to hold the Board liable for its *own* decision to remain idle in the face of known student-on-student harassment in its schools"). Discrimination by one student against another therefore cannot be "under" the school's program or activity as required by Title IX. The majority's imposition of liability for peer sexual harassment thus conflicts with the most natural interpretation of Title IX's "under a program

or activity" limitation on school liability. At the very least, my reading undermines the majority's implicit claim that Title IX imposes an unambiguous duty on schools to remedy peer sexual harassment.

B

1

Quite aside from its disregard for the "under the program" limitation of Title IX, the majority's reading is flawed in other respects. The majority contends that a school's deliberate indifference to known student harassment "subjects" students to harassment—that is, "cause[s] [students] to undergo" harassment. *Ante*, at 645. The majority recognizes, however, that there must be some limitation on the third-party conduct that the school can fairly be said to cause. In search of a principle, the majority asserts, without much elaboration, that one causes discrimination when one has some "degree of control" over the discrimination and fails to remedy it. *Ante*, at 644.

To state the majority's test is to understand that it is little more than an exercise in arbitrary line-drawing. The majority does not explain how we are to determine what degree of control is sufficient—or, more to the point, how the States were on clear notice that the Court would draw the line to encompass students.

Agency principles usually mark the outer limits of an entity's liability for the actions of an individual over whom it exercises some control. Cf. *Faragher* v. *Boca Raton*, 524 U. S. 775 (1998) (applying agency principles to delimit Title VII employer liability); *Burlington Industries, Inc.* v. *Ellerth*, 524 U. S. 742 (1998) (same). The Court, for example, has not recognized liability for the actions of nonagents under Title VII, which contains an express private right of action and is not Spending Clause legislation. The majority nonetheless rejects out-of-hand an agency limitation on Title IX liability based on its cramped reading of *Gebser*. As

noted above, the *Gebser* Court rejected the wholesale importation of federal common-law agency principles into Title IX to expand liability beyond that which the statute clearly prohibited; it did not, as the majority would have it, reject the proposition that school liability is limited by agency principles. Indeed, to suppose that Congress would have rejected well-established principles of agency law in favor of the majority's vague control principle turns *Gebser* on its head. *Gebser* contemplated that Title IX liability would be less expansive than Title VII liability, not more so. See *Gebser*, *supra*, at 286–287.

One would think that the majority would at least limit its control principle by reference to the long-established practice of the Department of Education (DOE). For the first 25 years after the passage of Title IX—until 1997—the DOE's regulations drew the liability line, at its most expansive, to encompass only those to whom the school delegated its official functions. See 34 CFR § 106.51(a)(3) (1998) ("A [grant] recipient shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination prohibited by this subpart, including relationships with employment and referral agencies, with labor unions, and with organizations providing or administering fringe benefits to employees of the recipient"). It is perhaps reasonable to suppose that grant recipients were on notice that they could not hire third parties to do for them what they could not do themselves. For example, it might be reasonable to find that a school was on notice that it could not circumvent Title IX's core prohibitions by, for example, delegating its admissions decisions to an outside screening committee it knew would discriminate on the basis of gender.

Given the state of gender discrimination law at the time Title IX was passed, however, there is no basis to think that Congress contemplated liability for a school's failure to remedy discriminatory acts by students or that the States would

believe the statute imposed on them a clear obligation to do so. When Title IX was enacted in 1972, the concept of "sexual harassment" as gender discrimination had not been recognized or considered by the courts. See generally C. MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination 59–72 (1979). The types of discrimination that were recognized—discriminatory admissions standards, denial of access to programs or resources, hiring, etc.—could not be engaged in by students. See, *e. g.*, 20 U. S. C. § 1681(a)(2) (referencing application of Title IX prohibitions to school admissions).

2

The majority nonetheless appears to see no need to justify drawing the "enough control" line to encompass students. In truth, however, a school's control over its students is much more complicated and limited than the majority acknowledges. A public school does not control its students in the way it controls its teachers or those with whom it contracts. Most public schools do not screen or select students, and their power to discipline students is far from unfettered.

Public schools are generally obligated by law to educate all students who live within defined geographic boundaries. Indeed, the Constitution of almost every State in the country guarantees the State's students a free primary and secondary public education. See, *e. g.*, Cal. Const., Art. IX, § 5; Colo. Const., Art. IX, § 2; Ga. Const., Art. VIII, § 1, ¶ 1; Ind. Const., Art. VIII, § 1; Md. Const., Art. VIII, § 1; Mo. Const., Art. IX, § 1(a); Neb. Const., Art. VII, § 1; N. J. Const., Art. VIII, § 4, ¶ 1; N. M. Const., Art. XII, § 1; N. Y. Const., Art. XI, § 1; N. D. Const., Art. VIII, §§ 1 and 2; Okla. Const., Art. XIII, § 1; S. C. Const., Art. XI, § 3; Tex. Const., Art. VII, § 1; Va. Const., Art. VIII, § 1; Wash. Const., Art. IX, §§ 1 and 2; Wyo. Const., Art. VII, §§ 1 and 9. In at least some States, moreover, there is a continuing duty on schools to educate even students who are suspended or expelled. See, *e. g.*,

*Phillip Leon M.* v. *Board of Education*, 199 W. Va. 400, 484 S. E. 2d 909 (1996) (holding that the education clause of the West Virginia Constitution confers on students a fundamental right to an education and requires that a county school board provide alternative educational programs, such as an alternative school, to students who are expelled or suspended for an extended period for bringing guns to school). Schools that remove a harasser from the classroom and then attempt to fulfill their continuing-education obligation by placing the harasser in any kind of group setting, rather than by hiring expensive tutors for each student, will find themselves at continuing risk of Title IX suits brought by the other students in the alternative education program.

In addition, federal law imposes constraints on school disciplinary actions. This Court has held, for example, that due process requires, "[a]t the very minimum," that a student facing suspension "be given some kind of notice and afforded some kind of hearing." *Goss* v. *Lopez*, 419 U. S. 565, 579 (1975).

The Individuals with Disabilities Education Act (IDEA), 20 U. S. C. § 1400 *et seq.* (1994 ed., Supp. III), moreover, places strict limits on the ability of schools to take disciplinary actions against students with behavior disorder disabilities, even if the disability was not diagnosed prior to the incident triggering discipline. See, *e. g.*, § 1415(f)(1) (parents entitled to hearing when school proposes to change disabled student's educational placement); § 1415(k)(1)(A) (school authorities can only "order a change in the placement of a child with a disability . . . to an appropriate interim alternative educational setting, another setting, or suspension" for up to "10 school days" unless student's offense involved a weapon or illegal drugs); § 1415(k)(8) ("[A] child who has not been determined to be eligible for special education . . . and who has engaged in behavior that violated any [school rule] may assert any of the protections" of the subchapter if the school "had knowledge . . . that the child was a child with a disabil-

ity before the behavior that precipitated the disciplinary action occurred"); § 1415(k)(8)(B)(ii) (school "deemed to have knowledge that a child is a child with a disability if . . . the behavior or performance of the child demonstrates the need for such [special education and related] services"). "Disability," as defined in the IDEA, includes "serious emotional disturbance," § 1401(3)(A)(i), which the DOE, in turn, has defined as a "condition exhibiting . . . over a long period of time and to a marked degree that adversely affects a child's educational performance," an "inability to build or maintain satisfactory interpersonal relationships with peers and teachers," or "[i]nappropriate types of behavior or feelings under normal circumstances." 34 CFR § 300.7(b)(9) (1998). If, as the majority would have us believe, the behavior that constitutes actionable peer sexual harassment so deviates from the normal teasing and jostling of adolescence that it puts schools on clear notice of potential liability, then a student who engages in such harassment may have at least a colorable claim of severe emotional disturbance within the meaning of the IDEA. When imposing disciplinary sanction on a student harasser who might assert a colorable IDEA claim, the school must navigate a complex web of statutory provisions and DOE regulations that significantly limit its discretion.

The practical obstacles schools encounter in ensuring that thousands of immature students conform their conduct to acceptable norms may be even more significant than the legal obstacles. School districts cannot exercise the same measure of control over thousands of students that they do over a few hundred adult employees. The limited resources of our schools must be conserved for basic educational services. Some schools lack the resources even to deal with serious problems of violence and are already overwhelmed with disciplinary problems of all kinds.

Perhaps even more startling than its broad assumptions about school control over primary and secondary school stu-

dents is the majority's failure to grapple in any meaningful way with the distinction between elementary and secondary schools, on the one hand, and universities on the other. The majority bolsters its argument that schools can control their students' actions by quoting our decision in *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. 646, 655 (1995), for the proposition that "'the nature of [the State's] power [over public school children] is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults.'" *Ante*, at 646. Yet the majority's holding would appear to apply with equal force to universities, which do not exercise custodial and tutelary power over their adult students.

A university's power to discipline its students for speech that may constitute sexual harassment is also circumscribed by the First Amendment. A number of federal courts have already confronted difficult problems raised by university speech codes designed to deal with peer sexual and racial harassment. See, *e. g.*, *Dambrot* v. *Central Mich. Univ.*, 55 F. 3d 1177 (CA6 1995) (striking down university discriminatory harassment policy because it was overbroad, vague, and not a valid prohibition on fighting words); *UWM Post, Inc.* v. *Board of Regents of Univ. of Wis. System*, 774 F. Supp. 1163 (ED Wis. 1991) (striking down university speech code that prohibited, *inter alia*, "'discriminatory comments'" directed at an individual that "'intentionally . . . demean'" the "'sex . . . of the individual'" and "'[c]reate an intimidating, hostile or demeaning environment for education, university related work, or other university-authorized activity'"); *Doe* v. *University of Mich.*, 721 F. Supp. 852 (ED Mich. 1989) (similar); *Iota XI Chapter of Sigma Chi Fraternity* v. *George Mason Univ.*, 993 F. 2d 386 (CA4 1993) (overturning on First Amendment grounds university's sanctions on a fraternity for conducting an "ugly woman contest" with "racist and sexist" overtones).

The difficulties associated with speech codes simply underscore the limited nature of a university's control over student behavior that may be viewed as sexual harassment. Despite the fact that the majority relies on the assumption that schools exercise a great deal of control over their students to justify creating the private cause of action in the first instance, it does not recognize the obvious limits on a university's ability to control its students as a reason to doubt the propriety of a private cause of action for peer harassment. It simply uses them as a factor in determining whether the university's response was reasonable. See *ante,* at 649.

3

The majority's presentation of its control test illustrates its own discomfort with the rule it has devised. Rather than beginning with the language of Title IX itself, the majority begins with our decision in *Gebser* and appears to discover there a sweeping legal duty—divorced from agency principles—for schools to remedy third-party discrimination against students. The majority then finds that the DOE's Title IX regulations and state common law gave States the requisite notice that they would be liable in damages for failure to fulfill this duty. Only then does the majority turn to the language of Title IX itself—not, it appears, to find a duty or clear notice to the States, for that the majority assumes has already been established, but rather to suggest a limit on the breathtaking scope of the liability the majority thinks is so clear under the statute. See *ante,* at 645 ("These factors [("subjects" and "under")] combine to limit a recipient's damages liability to circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs").

Our decision in *Gebser* did not, of course, recognize some ill-defined, freestanding legal duty on schools to remedy discrimination by third parties. In particular, *Gebser* gave schools no notice whatsoever that they might be liable on the

majority's novel theory that a school "subjects" a student to third-party discrimination if it exercises some measure of control over the third party. We quoted the "subjected to discrimination" language only once in *Gebser*, when we quoted the text of Title IX in full, and we did not use the word "control." Instead, we affirmed that Title IX prohibits discrimination by the grant recipient. See *Gebser*, 524 U. S., at 286; *id.*, at 291–292; *supra*, at 658–659.

Neither the DOE's Title IX regulations nor state tort law, moreover, could or did provide States the notice required by our Spending Clause principles. The majority contends that the DOE's Title IX regulations have "long provided funding recipients with notice that they may be liable for their failure to respond to the discriminatory acts of certain nonagents." *Ante*, at 643. Even assuming that DOE regulations could give schools the requisite notice, they did not do so. Not one of the regulations the majority cites suggests that schools may be held liable in money damages for failure to respond to third-party discrimination.

In addition, as discussed above, the DOE regulations provide no support for the proposition that schools were on notice that students were among those "nonagents" whose actions the schools were bound to remedy. Most of the regulations cited by the majority merely forbid grant recipients to give affirmative aid to third parties who discriminate. See 34 CFR § 106.31(b)(6) (1998) (A grant "recipient shall not, on the basis of sex," "[a]id or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees"); see also § 106.37(a)(2) (A grant recipient shall not, "[t]hrough solicitation, listing, approval, provision of facilities or other services, assist any foundation, trust, agency, organization, or person which provides assistance to any of such recipient's students in a manner which discriminates on the basis of sex"); § 106.38(a) (A grant recip-

ient "which assists any agency, organization or person in making employment available to any of its students [s]hall assure itself that such employment is made available without discrimination on the basis of sex [and] [s]hall not render such services to any agency, organization, or person which discriminates on the basis of sex in its employment practices"). The others forbid grant recipients to delegate the provision of student (or employee) benefits and services to third parties who engage in gender discrimination in administering what is, in effect, the school's program. See § 106.51(a)(3) ("A [grant] recipient shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination prohibited by this subpart, including relationships with employment and referral agencies, with labor unions, and with organizations providing or administering fringe benefits to employees of the recipient"); see also § 106.31(d) (A grant recipient "which requires participation by any applicant, student, or employee in any education program or activity not operated wholly by such recipient, or which facilitates, permits, or considers such participation as part of or equivalent to an education program or activity operated by such recipient, including participation in educational consortia and cooperative employment and student-teaching assignments" must take steps to assure itself that the education program or activity is not discriminating on the basis of gender and "shall not facilitate, require, permit, or consider such participation" if the program is discriminating). None of the regulations suggests a generalized duty to remedy discrimination by third parties over whom the school may arguably exercise some control.

Requiring a school to take affirmative steps to remedy harassment by its students imposes a much heavier burden on schools than prohibiting affirmative aid or effective delegation of school functions to an entity that discriminates. Notice of these latter responsibilities, then, can hardly be said

to encompass clear notice of the former. In addition, each of the DOE regulations is predicated on a grant recipient's choice to give affirmative aid to, or to enter into voluntary association with, a discriminating entity. The recipient, moreover, as the regulations envision, is free to terminate that aid or association (or could have so provided through contract). The relationships regulated by the DOE are thus quite different from school-student relationships. The differences confirm that the regulations did not provide adequate notice of a duty to remedy student discrimination.

The majority also concludes that state tort law provided States the requisite notice. It is a non sequitur to suppose, however, that a State knows it is liable under a federal statute simply because the underlying conduct might form the basis for a state tort action. In any event, it is far from clear that Georgia law gave the Monroe County Board of Education notice that it would be liable even under state law for failure to respond reasonably to known student harassment. See, *e. g.*, *Holbrook* v. *Executive Conference Center, Inc.*, 219 Ga. App. 104, 106, 464 S. E. 2d 398, 401 (1996) (holding that school districts are entitled to sovereign immunity for claims based on their supervision of students unless the school displayed "wilfulness, malice, or corruption").

The majority's final observation about notice confirms just how far it has strayed from the basic Spending Clause principle that Congress must, through the clear terms of the statute, give States notice as to what the statute requires. The majority contends that schools were on notice because they "were being told" by a 1993 National School Boards Association publication that peer sexual harassment might trigger Title IX liability. *Ante*, at 647. By treating a publication designed to help school lawyers prevent and guard against school liability as a reliable indicium of congressional notice, the majority has transformed a litigation manual—which, like all such manuals, errs on the side of caution in describing potential liability—into a self-fulfilling prophecy. It seems

schools cannot even discuss potential liabilities amongst themselves without somehow stipulating that Congress had some specified intent.

## II

Our decision in *Gebser* makes clear that the Spending Clause clear-notice rule requires both that the recipients be on general notice of the kind of conduct the statute prohibits, and—at least when money damages are sought—that they be on notice that illegal conduct is occurring in a given situation. See, *e. g.*, *Gebser*, 524 U. S., at 287–288 (rejecting vicarious liability because it would hold schools liable even when they did not know that prohibited discrimination was occurring).

Title IX, however, gives schools neither notice that the conduct the majority labels peer "sexual harassment" is gender discrimination within the meaning of the Act nor any guidance in distinguishing in individual cases between actionable discrimination and the immature behavior of children and adolescents. The majority thus imposes on schools potentially crushing financial liability for student conduct that is not prohibited in clear terms by Title IX and that cannot, even after today's opinion, be identified by either schools or courts with any precision.

The law recognizes that children—particularly young children—are not fully accountable for their actions because they lack the capacity to exercise mature judgment. See, *e. g.*, 1 E. Farnsworth, Contracts § 4.4 (2d ed. 1998) (discussing minor's ability to disaffirm a contract into which he has entered). It should surprise no one, then, that the schools that are the primary locus of most children's social development are rife with inappropriate behavior by children who are just learning to interact with their peers. The *amici* on the front lines of our schools describe the situation best:

> "Unlike adults in the workplace, juveniles have limited life experiences or familial influences upon which to es-

> tablish an understanding of appropriate behavior. The real world of school discipline is a rough-and-tumble place where students practice newly learned vulgarities, erupt with anger, tease and embarrass each other, share offensive notes, flirt, push and shove in the halls, grab and offend." Brief for National School Boards Association et al. as *Amici Curiae* 10–11 (hereinafter Brief for School *Amici*).

No one contests that much of this "dizzying array of immature or uncontrollable behaviors by students," *ibid.*, is inappropriate, even "objectively offensive" at times, *ante*, at 650, and that parents and schools have a moral and ethical responsibility to help students learn to interact with their peers in an appropriate manner. It is doubtless the case, moreover, that much of this inappropriate behavior is directed toward members of the opposite sex, as children in the throes of adolescence struggle to express their emerging sexual identities.

It is a far different question, however, whether it is either proper or useful to label this immature, childish behavior gender discrimination. Nothing in Title IX suggests that Congress even contemplated this question, much less answered it in the affirmative in unambiguous terms.

The majority, nevertheless, has no problem labeling the conduct of fifth graders "sexual harassment" and "gender discrimination." Indeed, the majority sidesteps the difficult issue entirely, first by asserting without analysis that respondents do not "support an argument that student-on-student harassment cannot rise to the level of discrimination' for purposes of Title IX," *ante*, at 639, and then by citing *Gebser* and *Franklin* v. *Gwinnett County Public Schools*, 503 U. S. 60 (1992), for the proposition that "[w]e have elsewhere concluded that sexual harassment is a form of discrimination for Title IX purposes and that Title IX proscribes harassment with sufficient clarity to satisfy *Pennhurst*'s no-

tice requirement and serve as a basis for a damages action," *ante*, at 649–650.

Contrary to the majority's assertion, however, respondents have made a cogent and persuasive argument that the type of student conduct alleged by petitioner should not be considered "sexual harassment," much less gender discrimination actionable under Title IX:

> "[A]t the time Petitioner filed her complaint, no court, including this Court had recognized the concept of sexual harassment in any context other than the employment context. Nor had any Court extended the concept of sexual harassment to the misconduct of emotionally and socially immature children. The type of conduct alleged by Petitioner in her complaint is not new. However, in past years it was properly identified as misconduct which was addressed within the context of student discipline. The Petitioner now asks this Court to create out of whole cloth a cause of action by labeling childish misconduct as 'sexual harassment,' to stigmatize children as sexual harassers, and have the federal court system take on the additional burden of second guessing the disciplinary actions taken by school administrators in addressing misconduct, something this Court has consistently refused to do." Brief for Respondents 12–13 (citation omitted).

See also Brief for Independent Women's Forum as *Amicus Curiae* 19 (questioning whether "at the primary and secondary school level" it is proper to label "sexual misconduct by students" as "sexual harassment" because there is no power relationship between the harasser and the victim).

Likewise, the majority's assertion that *Gebser* and *Franklin* settled the question is little more than *ipse dixit*. *Gebser* and *Franklin* themselves did nothing more than cite *Meritor Savings Bank, FSB* v. *Vinson*, 477 U. S. 57, 64 (1986), a Title VII case, for the proposition that "when a su-

pervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." See *Franklin, supra,* at 74; *Gebser,* 524 U. S., at 282–283. To treat that proposition as establishing that the student conduct at issue here is gender discrimination is to erase, in one stroke, all differences between children and adults, peers and teachers, schools and workplaces.

In reality, there is no established body of federal or state law on which courts may draw in defining the student conduct that qualifies as Title IX gender discrimination. Analogies to Title VII hostile environment harassment are inapposite, because schools are not workplaces and children are not adults. The norms of the adult workplace that have defined hostile environment sexual harassment, see, *e. g.,* *Oncale* v. *Sundowner Offshore Services, Inc.,* 523 U. S. 75 (1998), are not easily translated to peer relationships in schools, where teenage romantic relationships and dating are a part of everyday life. Analogies to Title IX teacher sexual harassment of students are similarly flawed. A teacher's sexual overtures toward a student are always inappropriate; a teenager's romantic overtures to a classmate (even when persistent and unwelcome) are an inescapable part of adolescence.

The majority admits that, under its approach, "[w]hether gender-oriented conduct rises to the level of actionable 'harassment' . . . 'depends on a constellation of surrounding circumstances, expectations, and relationships,' including, but not limited to, the ages of the harasser and the victim and the number of individuals involved." *Ante,* at 651 (citations omitted). The majority does not explain how a school is supposed to discern from this mishmash of factors what is actionable discrimination. Its multifactored balancing test is a far cry from the clarity we demand of Spending Clause legislation.

The difficulties schools will encounter in identifying peer sexual harassment are already evident in teachers' manuals

designed to give guidance on the subject. For example, one teachers' manual on peer sexual harassment suggests that sexual harassment in kindergarten through third grade includes a boy being "put down" on the playground "because he wants to play house with the girls" or a girl being "put down because she shoots baskets better than the boys." Minnesota Dept. of Education, Girls and Boys Getting Along: Teaching Sexual Harassment Prevention in the Elementary Classroom 65 (1993). Yet another manual suggests that one student saying to another, "You look nice," could be sexual harassment, depending on the "tone of voice," how the student looks at the other, and "who else is around." N. Stein & L. Sjostrom, Flirting or Hurting? A Teacher's Guide on Student-to-Student Sexual Harassment in Schools (Grades 6 through 12), p. 14 (1994). Blowing a kiss is also suspect. *Ibid.* This confusion will likely be compounded once the sexual harassment label is invested with the force of federal law, backed up by private damages suits.

The only guidance the majority gives schools in distinguishing between the "simple acts of teasing and name-calling among school children," said not to be a basis for suit even when they "target differences in gender," *ante*, at 652, and actionable peer sexual harassment is, in reality, no guidance at all. The majority proclaims that "in the context of student-on-student harassment, damages are available only where the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect." *Ibid.* The majority does not even purport to explain, however, what constitutes an actionable denial of "equal access to education." Is equal access denied when a girl who tires of being chased by the boys at recess refuses to go outside? When she cannot concentrate during class because she is worried about the recess activities? When she pretends to be sick one day so she can stay home from school? It appears the majority is content to let juries decide.

The majority's reference to a "systemic effect," *ante*, at 653, does nothing to clarify the content of its standard. The majority appears to intend that requirement to do no more than exclude the possibility that a single act of harassment perpetrated by one student on one other student can form the basis for an actionable claim. That is a small concession indeed.

The only real clue the majority gives schools about the dividing line between actionable harassment that denies a victim equal access to education and mere inappropriate teasing is a profoundly unsettling one: On the facts of this case, petitioner has stated a claim because she alleged, in the majority's words, "that the harassment had a concrete, negative effect on her daughter's ability to receive an education." *Ante*, at 654. In petitioner's words, the effects that might have been visible to the school were that her daughter's grades "dropped" and her "ability to concentrate on her school work [was] affected." App. to Pet. for Cert. 97a. Almost all adolescents experience these problems at one time or another as they mature.

## III

The majority's inability to provide any workable definition of actionable peer harassment simply underscores the myriad ways in which an opinion that purports to be narrow is, in fact, so broad that it will support untold numbers of lawyers who will prove adept at presenting cases that will withstand the defendant school districts' pretrial motions. Each of the barriers to runaway litigation the majority offers us crumbles under the weight of even casual scrutiny.

For example, the majority establishes what sounds like a relatively high threshold for liability—"denial of equal access" to education—and, almost in the same breath, makes clear that alleging a decline in grades is enough to survive Federal Rule of Civil Procedure 12(b)(6) and, it follows, to state a winning claim. The majority seems oblivious to the

fact that almost every child, at some point, has trouble in school because he or she is being teased by his or her peers. The girl who wants to skip recess because she is teased by the boys is no different from the overweight child who skips gym class because the other children tease her about her size in the locker room; or the child who risks flunking out because he refuses to wear glasses to avoid the taunts of "four-eyes"; or the child who refuses to go to school because the school bully calls him a "scaredy-cat" at recess. Most children respond to teasing in ways that detract from their ability to learn. The majority's test for actionable harassment will, as a result, sweep in almost all of the more innocuous conduct it acknowledges as a ubiquitous part of school life.

The string of adjectives the majority attaches to the word "harassment"—"severe, pervasive, and objectively offensive"—likewise fails to narrow the class of conduct that can trigger liability, since the touchstone for determining whether there is Title IX liability is the effect on the child's ability to get an education. *Ante,* at 650. Indeed, the Court's reliance on the impact on the child's educational experience suggests that the "objective offensiveness" of a comment is to be judged by reference to a reasonable child at whom the comments were aimed. Not only is that standard likely to be quite expansive, it also gives schools—and juries—little guidance, requiring them to attempt to gauge the sensitivities of, for instance, the average seven-year-old.

The majority assures us that its decision will not interfere with school discipline and instructs that, "as we have previously noted, courts should refrain from second-guessing the disciplinary decisions made by school administrators." *Ante,* at 648. The obvious reason for the majority's expressed reluctance to allow courts and litigants to second-guess school disciplinary decisions is that school officials are usually in the best position to judge the seriousness of alleged harassment and to devise an appropriate response. The problem is that the majority's test, in fact, invites courts

and juries to second-guess school administrators in every case, to judge in each instance whether the school's response was "clearly unreasonable." A reasonableness standard, regardless of the modifier, transforms every disciplinary decision into a jury question. Cf. *Doe* v. *University of Illinois*, 138 F. 3d 653, 655 (CA7 1998) (holding that college student had stated a Title IX claim for peer sexual harassment even though school officials had suspended two male students for 10 days and transferred another out of her biology class).

Another professed limitation the majority relies upon is that the recipient will be liable only where the acts of student harassment are "known." See, *e. g.*, *ante*, at 644, 647. The majority's enunciation of the standard begs the obvious question: known to whom? Yet the majority says not one word about the type of school employee who must know about the harassment before it is actionable.

The majority's silence is telling. The deliberate indifference liability we recognized in *Gebser* was predicated on notice to "an official of the recipient entity with authority to take corrective action to end the discrimination." 524 U. S., at 290. The majority gives no indication that it believes the standard to be any different in this context and—given its extensive reliance on the *Gebser* standard throughout the opinion—appears to adopt the *Gebser* notice standard by implication. At least the courts adjudicating Title IX peer harassment claims are likely to so conclude.

By choosing not to adopt the standard in explicit terms, the majority avoids having to confront the bizarre implications of its decision. In the context of teacher harassment, the *Gebser* notice standard imposes some limit on school liability. Where peer harassment is the discrimination, however, it imposes no limitation at all. In most cases of student misbehavior, it is the teacher who has authority, at least in the first instance, to punish the student and take other measures to remedy the harassment. The anomalous result will be that, while a school district cannot be held liable for

a teacher's sexual harassment of a student without notice to the school board (or at least to the principal), the district can be held liable for a teacher's failure to remedy peer harassment. The threshold for school liability, then, appears to be lower when the harasser is a student than when the harasser is a teacher who is an agent of the school. The absurdity of this result confirms that it was neither contemplated by Congress nor anticipated by the States.

The majority's limitations on peer sexual harassment suits cannot hope to contain the flood of liability the Court today begins. The elements of the Title IX claim created by the majority will be easy not only to allege but also to prove. A female plaintiff who pleads only that a boy called her offensive names, that she told a teacher, that the teacher's response was unreasonable, and that her school performance suffered as a result, appears to state a successful claim.

There will be no shortage of plaintiffs to bring such complaints. Our schools are charged each day with educating millions of children. Of those millions of students, a large percentage will, at some point during their school careers, experience something they consider sexual harassment. A 1993 study by the American Association of University Women Educational Foundation, for instance, found that "fully 4 out of 5 students (81%) report that they have been the target of some form of sexual harassment during their school lives." Hostile Hallways: The AAUW Survey on Sexual Harassment in America's Schools 7 (1993). The number of potential lawsuits against our schools is staggering.

The cost of defending against peer sexual harassment suits alone could overwhelm many school districts, particularly since the majority's liability standards will allow almost any plaintiff to get to summary judgment, if not to a jury. In addition, there are no damages caps on the judicially implied private cause of action under Title IX. As a result, school liability in one peer sexual harassment suit could approach, or even exceed, the total federal funding of many school dis-

tricts. Petitioner, for example, seeks damages of $500,000 in this case. App. to Pet. for Cert. 101a. Respondent school district received approximately $679,000 in federal aid in 1992–1993. Brief for School *Amici* 25, n. 20. The school district sued in *Gebser* received only $120,000 in federal funds a year. 524 U. S., 289–290. Indeed, the entire 1992–1993 budget of that district was only $1.6 million. See Tr. of Oral Arg. in No. 96–1866, p. 34.

The limitless liability confronting our schools under the implied Title IX cause of action puts schools in a far worse position than businesses; when Congress established the express cause of action for money damages under Title VII, it prescribed damages caps. See *Gebser*, *supra*, at 286 ("It was not until 1991 that Congress made damages available under Title VII, and even then, Congress carefully limited the amount recoverable in any individual case, calibrating the maximum recovery to the size of the employer. See 42 U. S. C. § 1981a(b)(3). Adopting petitioner's position would amount, then, to allowing unlimited recovery of damages under Title IX where Congress has not spoken on the subject of either the right or the remedy, and in the face of evidence that when Congress expressly considered both in Title VII it restricted the amount of damages available"). In addition, in contrast to Title VII, Title IX makes no provision for agency investigation and conciliation of complaints (prior to the filing of a case in federal court) that could weed out frivolous suits or settle meritorious ones at minimal cost.

The prospect of unlimited Title IX liability will, in all likelihood, breed a climate of fear that encourages school administrators to label even the most innocuous of childish conduct sexual harassment. It would appear to be no coincidence that, not long after the DOE issued its proposed policy guidance warning that schools could be liable for peer sexual harassment in the fall of 1996, see 61 Fed. Reg. 42728, a North Carolina school suspended a 6-year-old boy who kissed a female classmate on the cheek for sexual harassment, on the

theory that "[u]nwelcome is unwelcome at any age." Los Angeles Times, Sept. 25, 1996, p. A11. A week later, a New York school suspended a second grader who kissed a classmate and ripped a button off her skirt. Buffalo News, Oct. 2, 1996, p. A16. The second grader said that he got the idea from his favorite book "Corduroy," about a bear with a missing button. *Ibid.* School administrators said only, "We were given guidelines as to why we suspend children. We follow the guidelines." *Ibid.*

At the college level, the majority's holding is sure to add fuel to the debate over campus speech codes that, in the name of preventing a hostile educational environment, may infringe students' First Amendment rights. See *supra*, at 667. Indeed, under the majority's control principle, schools presumably will be responsible for remedying conduct that occurs even in student dormitory rooms. As a result, schools may well be forced to apply workplace norms in the most private of domains.

Even schools that resist overzealous enforcement may find that the most careful and reasoned response to a sexual harassment complaint nonetheless provokes litigation. Speaking with the voice of experience, the school *amici* remind us, "[h]istory shows that, no matter what a school official chooses to do, someone will be unhappy. Student offenders almost always view their punishment as too strict, and student complainants almost always view an offender's punishment as too lax." Brief for School *Amici* 12 (footnotes omitted).

A school faced with a peer sexual harassment complaint in the wake of the majority's decision may well be beset with litigation from every side. One student's demand for a quick response to her harassment complaint will conflict with the alleged harasser's demand for due process. Another student's demand for a harassment-free classroom will conflict with the alleged harasser's claim to a mainstream placement under the IDEA or with his state constitutional right to a continuing, free public education. On college campuses, and

even in secondary schools, a student's claim that the school should remedy a sexually hostile environment will conflict with the alleged harasser's claim that his speech, even if offensive, is protected by the First Amendment. In each of these situations, the school faces the risk of suit, and maybe even multiple suits, regardless of its response. See *Doe* v. *University of Illinois*, 138 F. 3d, at 679 (Posner, C. J., dissenting from denial of rehearing en banc) ("Liability for failing to prevent or rectify sexual harassment of one student by another places a school on a razor's edge, since the remedial measures that it takes against the alleged harasser are as likely to expose the school to a suit by him as a failure to take those measure[s] would be to expose the school to a suit by the victim of the alleged harassment").

The majority's holding in this case appears to be driven by the image of the school administration sitting idle every day while male students commandeer a school's athletic field or computer lab and prevent female students from using it through physical threats. See *ante*, at 650–651. Title IX might provide a remedy in such a situation, however, without resort to the majority's unprecedented theory of school liability for student harassment. If the school usually disciplines students for threatening each other and prevents them from blocking others' access to school facilities, then the school's failure to enforce its rules when the boys target the girls on a widespread level, day after day, may support an inference that the school's decision not to respond is itself based on gender. That pattern of discriminatory response could form the basis of a Title IX action.

(Contrary to the majority's assertion, see *ante*, at 653, I do not suggest that mere indifference to gender-based mistreatment—even if widespread—is enough to trigger Title IX liability. I suggest only that a clear pattern of discriminatory enforcement of school rules could raise an inference that the school itself is discriminating. Recognizing that the school itself might discriminate based on gender in the en-

forcement of its rules is a far cry from recognizing Title IX liability based on the majority's expansive theory that a school "subjects" its students to third-party discrimination when it has some control over the harasser and fails to take corrective action.)

Even more important, in most egregious cases the student will have state-law remedies available to her. The student will often have recourse against the offending student (or his parents) under state tort law. In some cases, like this one, the perpetrator may also be subject to criminal sanctions. And, as the majority notes, the student may, in some circumstances, have recourse against the school under state law. *Ante*, at 644.

Disregarding these state-law remedies for student misbehavior and the incentives that our schools already have to provide the best possible education to all of their students, the majority seeks, in effect, to put an end to student misbehavior by transforming Title IX into a Federal Student Civility Code. See Brief for Independent Women's Forum as *Amicus Curiae* 2 (urging the Court to avoid that result). I fail to see how federal courts will administer school discipline better than the principals and teachers to whom the public has entrusted that task or how the majority's holding will help the vast majority of students, whose educational opportunities will be diminished by the diversion of school funds to litigation. The private cause of action the Court creates will justify a corps of federal administrators in writing regulations on student harassment. It will also embroil schools and courts in endless litigation over what qualifies as peer sexual harassment and what constitutes a reasonable response.

In the final analysis, this case is about federalism. Yet the majority's decision today says not one word about the federal balance. Preserving our federal system is a legitimate end in itself. It is, too, the means to other ends. It ensures that essential choices can be made by a government

more proximate to the people than the vast apparatus of federal power. Defining the appropriate role of schools in teaching and supervising children who are beginning to explore their own sexuality and learning how to express it to others is one of the most complex and sensitive issues our schools face. Such decisions are best made by parents and by the teachers and school administrators who can counsel with them. The delicacy and immense significance of teaching children about sexuality should cause the Court to act with great restraint before it displaces state and local governments.

Heedless of these considerations, the Court rushes onward, finding that the cause of action it creates is necessary to effect the congressional design. It is not. Nothing in Title IX suggests that Congress intended or contemplated the result the Court reaches today, much less dictated it in unambiguous terms. Today's decision cannot be laid at the feet of Congress; it is the responsibility of the Court.

The Court must always use great care when it shapes private causes of action without clear guidance from Congress, but never more so than when the federal balance is at stake. As we recognized in *Gebser*, the definition of an implied cause of action inevitably implicates some measure of discretion in the Court to shape a sensible remedial scheme. 524 U. S., at 284. Whether the Court ever should have embarked on this endeavor under a Spending Clause statute is open to question. What should be clear beyond any doubt, however, is that the Court is duty bound to exercise that discretion with due regard for federalism and the unique role of the States in our system. The Court today disregards that obligation. I can conceive of few interventions more intrusive upon the delicate and vital relations between teacher and student, between student and student, and between the State and its citizens than the one the Court creates today by its own hand. Trusted principles of federalism are superseded by a more contemporary imperative.

Perhaps the most grave, and surely the most lasting, disservice of today's decision is that it ensures the Court's own disregard for the federal balance soon will be imparted to our youngest citizens. The Court clears the way for the Federal Government to claim center stage in America's classrooms. Today's decision mandates to teachers instructing and supervising their students the dubious assistance of federal court plaintiffs and their lawyers and makes the federal courts the final arbiters of school policy and of almost every disagreement between students. Enforcement of the federal right recognized by the majority means that federal influence will permeate everything from curriculum decisions to day-to-day classroom logistics and interactions. After today, Johnny will find that the routine problems of adolescence are to be resolved by invoking a federal right to demand assignment to a desk two rows away.

As its holding makes painfully clear, the majority's watered-down version of the Spending Clause clear-statement rule is no substitute for the real protections of state and local autonomy that our constitutional system requires. If there be any doubt of the futility of the Court's attempt to hedge its holding about with words of limitation for future cases, the result in this case provides the answer. The complaint of this fifth grader survives and the school will be compelled to answer in federal court. We can be assured that like suits will follow—suits, which in cost and number, will impose serious financial burdens on local school districts, the taxpayers who support them, and the children they serve. Federalism and our struggling school systems deserve better from this Court. I dissent.

**721 F.Supp. 852 (1989)**

**John DOE, Plaintiff,**

**v.**

**UNIVERSITY OF MICHIGAN, Defendant.**

Civ. No. 89-71683.

**United States District Court, E.D. Michigan, Southern Division.**

September 22, 1989.
Addendum September 25, 1989.

853 *853 Robert A. Sedler, Paul J. Denenfeld, for plaintiff.

Dickinson, Wright, Moon, Van Dusen & Freeman by Henry W. Saad, Joseph C. Marshall, III, Robert Powell, Elizabeth M. Pezzetti, Bloomfield Hills, Mich., for defendant.

## OPINION

COHN, District Judge.

> [T]aking stock of the legal system's own limitations, we must realize that judges, being human, will not only make mistakes but will sometimes succumb to the pressures exerted by the government to allow restraints [on speech] that ought not to be allowed. To guard against these possibilities we must give judges as little room to maneuver as possible and, again, extend the boundary of the realm of protected speech into the hinterlands of speech in order to minimize the potential harm from judicial miscalculation and misdeeds.

L. Bollinger, *The Tolerant Society* 78 (1986).

## I. INTRODUCTION

It is an unfortunate fact of our constitutional system that the ideals of freedom and equality are often in conflict. The difficult and sometimes painful task of our political and legal institutions is to mediate the appropriate balance between these two competing values. Recently, the University of Michigan at Ann Arbor (the University), a state-chartered university, *see* Mich. Const. art. VIII, adopted a Policy on Discrimination and Discriminatory Harassment of Students in the University Environment (the Policy) in an attempt to curb what the University's governing Board of Regents (Regents) viewed as a rising tide of racial intolerance and harassment on campus. The Policy prohibited individuals, under the penalty of sanctions, from "stigmatizing or victimizing" individuals or groups on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status. However laudable or appropriate an effort this may have been, the Court found that the Policy swept within its scope a significant amount of "verbal conduct" or "verbal behavior" which is unquestionably protected speech under the First Amendment. Accordingly, the Court granted
854 plaintiff *854 John Doe's (Doe)[1] prayer for a permanent injunction as to those parts of the Policy restricting speech activity, but denied the injunction as to the Policy's regulation of physical conduct. The reasons follow.[2]

## II. FACTS GENERALLY

According to the University, in the last three years incidents of racism and racial harassment appeared to become increasingly frequent at the University. For example, on January 27, 1987, unknown persons distributed a flier declaring "open season" on blacks, which it referred to as "saucer lips, porch monkeys, and jigaboos." On February 4, 1987, a student disc jockey at an on-campus radio station allowed racist jokes to be broadcast. At a demonstration protesting these incidents, a Ku Klux Klan uniform was displayed from a dormitory window. These events and others prompted the University's President on February 19, 1987 to issue a statement expressing outrage and reaffirming the University's

commitment to maintaining a racially, ethnically, and culturally diverse campus. The University was unable to identify any of the perpetrators. It is unknown whether the culprits were students. Likewise, there was no evidence to suggest that these were anything other than isolated and purposeless acts.

On March 5, 1987, the Chairperson of the State House of Representatives Appropriations Subcommittee on Higher Education held a public hearing on the problem of racism at the University in Ann Arbor. Forty-eight speakers addressed the subcommittee and an audience of about 600. The speakers were uniformly critical of the University's response to racial incidents and accused it of generally ignoring the problems of minority students. At the close of the hearing, the Chairperson was quoted as stating

> Michigan legislators will not tolerate racism on the campus of a state institution ... Racism has no place in this day and age.... [The subcommittee] will make our decision [on appropriations for the University] during their budget discussions of the next few weeks.... Some things have to change. The committee members want to meet with [the University's President]. Holding up funds as a club may be part of our response, but that will predicate on how the university responds.

Following the hearing, the United Coalition Against Racism (UCAR), a campus anti-discrimination group, announced that it intended to file a class action civil rights suit against the University "for not maintaining or creating a non-racist, non-violent atmosphere" on campus. Following discussions with a national civil rights leader in March of 1987, the University adopted a six-point action plan to remedy the racial problems on campus. This included the adoption of "[a]n anti-racial harassment policy ... as a component of the University's rules and regulations with appropriate sanctions specified."

On September 22, 1987, the University's President issued a memorandum to the various schools of the University directing them to refer complaints of discriminatory harassment to the Affirmative Action Office in the Office of the President for monitoring and evaluation. An analysis of the complaints which were filed reflects that the University had neither independently verified the accuracy of the complaints nor identified a specific perpetrator for most of the incidents
855 described. Likewise, there is no way by which it can be determined whether such incidents occur more frequently *855 at the University than other comparable institutions.

In December 1987, the University President resigned and a former University president was temporarily appointed to the post until a permanent successor was chosen. On December 14, 1987, the Acting President circulated a confidential memorandum to the University's executive officers detailing a proposal for an anti-discrimination disciplinary policy. The proposed policy prohibited "[h]arassment of anyone through word or deed or any other behavior which discriminates on the basis of inappropriate criteria." The Acting President recognized at the time that the proposed policy would engender serious First Amendment problems, but reasoned that

> just as an individual cannot shout "Fire!" in a crowded theater and then claim immunity from prosecution for causing a riot on the basis of exercising his rights of free speech, so a great many American universities have taken the position that students at a university cannot by speaking or writing discriminatory remarks which seriously offend many individuals beyond the immediate victim, and which, therefore detract from the necessary educational climate of a campus, claim immunity from a campus disciplinary proceeding. I believe that position to be valid.

The other "American universities" to which the President referred to were not identified at any time. Nor was any document presented to the Court in any form which "valid[ates]" this "position."

At the January 15, 1988 meeting of the Regents, the Acting President informed the Board that he been working on a proposed policy on student discipline dealing with racial harassment pursuant to his general authority under Regents' Bylaw 2.01.[3] He stated that he was taking this action in response to widespread complaints that the University could not or would not enforce its existing regulations concerning racial harassment. Adoption of a policy, he noted, "would enable the University to take the position that it was willing to do something about this issue."[4] The Acting President conceded that any proposed policy would implicate serious civil liberties questions, but he expressed a commitment to pursue the problem nevertheless.

Following the January meeting, the Acting President appointed the Director of the University Office of Affirmative Action (Director) to draft a policy. The proposed policy went through twelve drafts. Throughout this process, the Director consulted with a lawyer in the Office of University Counsel and perhaps several University of Michigan Law School professors.[5] On

February 29, 1988, a proposed policy was published in the *University Record* and faculty, students, and staff were invited to comment. A public hearing on the proposed policy was held on March 16, 1988 at which numerous speakers commented and suggested various changes and refinements. The next day, the Acting President introduced the draft policy for consideration at the monthly Regents meeting. In the ensuing discussion, one Regent expressed concern that the policy would unduly restrict students' free speech rights. A second Regent criticized the policy on the grounds that it failed to
856 address the problem of students heckling outside speakers *856 who came to the campus. The Regents agreed that the final draft incorporating the suggested changes would be presented at the next meeting. University officers also promised that an interpretive guide with examples of sanctionable conduct would be issued as an authoritative guide for the benefit of the University community. At the April 14, 1988 Regents meeting, the Policy was unanimously adopted. It became effective on May 31, 1988 and was set to expire on December 31, 1989 unless reenacted.

## III. THE UNIVERSITY OF MICHIGAN POLICY ON DISCRIMINATION AND DISCRIMINATORY HARASSMENT

### A. *The Terms of the Policy*

The Policy established a three-tiered system whereby the degree of regulation was dependent on the location of the conduct at issue. The broadest range of speech and dialogue was "tolerated" in variously described public parts of the campus. Only an act of physical violence or destruction of property was considered sanctionable in these settings. Publications sponsored by the University such as the *Michigan Daily* and the *Michigan Review* were not subject to regulation. The conduct of students living in University housing is primarily governed by the standard provisions of individual leases, however the Policy appeared to apply in this setting as well.[6] The Policy by its terms applied specifically to "[e]ducational and academic centers, such as classroom buildings, libraries, research laboratories, recreation and study centers[.]" In these areas, persons were subject to discipline for:

> 1. Any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status, and that
>
> a. Involves an express or implied threat to an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or
>
> b. Has the purpose or reasonably foreseeable effect of interfering with an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or
>
> c. Creates an intimidating, hostile, or demeaning environment for educational pursuits, employment or participation in University sponsored extracurricular activities.
>
> 2. Sexual advances, requests for sexual favors, and verbal or physical conduct that stigmatizes or victimizes an individual on the basis of sex or sexual orientation where such behavior:
>
> a. Involves an express or implied threat to an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or
>
> b. Has the purpose or reasonably foreseeable effect of interfering with an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or
>
> c. Creates an intimidating, hostile, or demeaning environment for educational pursuits, employment or participation in University sponsored extra-curricular activities.

On August 22, 1989, the University publicly announced, without prior notice to the Court or Doe, that it was withdrawing section 1(c) on the grounds that "a need exists for further explanation and clarification of [that section] of the policy." No reason was given why the analogous provision in paragraph 2(c) was allowed to stand.

The Policy by its terms recognizes that certain speech which might be considered in violation may not be sanctionable,
857 stating: "The Office of the General Counsel *857 will rule on any claim that conduct which is the subject of a formal hearing

is constitutionally protected by the first amendment."

## B. *Hearing Procedures*

Any member of the University community could initiate the process leading to sanctions by either filing a formal complaint with an appropriate University office or by seeking informal counseling with described University officials and support centers. The Policy states that it is the preference of the University to employ informal mechanisms for mediation and resolution of complaints whenever possible and in fact most complainants have chosen to proceed informally. University officers are authorized to act as mediators and employ educational sanctions, community service, disciplinary warnings, and restitution in attempting to reach a settlement acceptable to both the victim and the perpetrator. None of the records relating to enforcement of the Policy are to be included in a student's academic files, and the records so generated are to be maintained in accordance with applicable privacy laws.

Where a negotiated settlement proves impossible, a formal complaint would be filed with the Administrator of Complaints of Discriminatory Behavior in the Office of Vice-President of Student Services (Policy Administrator). The Policy Administrator would then undertake an independent investigation of the alleged incident to determine whether there is sufficient evidence of a violation to warrant the initiation of a formal hearing. If a hearing were necessary, a panel consisting of four students and one tenured faculty member would be convened to pass on the merits. The accused student would then be notified that a complaint had been filed against him or her, the specific charges, the identity of the complaining witness, and the facts of the complaint and investigation. At the hearing, the Policy Administrator would be responsible for presenting the charges against the accused student. Both the accused student and the complainant had the right to call and cross-examine witnesses and give testimony. The accused student had the right to have an attorney present at the hearing, but the attorney could not participate fully in the hearing unless suspension or expulsion were likely sanctions. If a majority of the hearing panel found by clear and convincing evidence that the Policy had been violated, they were to recommend an appropriate sanction. If the accused student was dissatisfied with the panel's decision, he or she had the right to have an appellate tribunal consisting of two students and the Vice-President for Student Services independently review the conviction and sanction.

## C. *Sanctions*

The Policy provided for progressive discipline based on the severity of the violation. It stated that the University encouraged hearing panels to impose sanctions that include an educational element in order to sensitize the perpetrator to the harmfulness of his or her conduct. The Policy provided, however, that compulsory class attendance should not be imposed "in an attempt to change deeply held religious or moral convictions." Depending on the intent of the accused student, the effect of the conduct, and whether the accused student is a repeat offender, one or more of the following sanctions may be imposed: (1) formal reprimand; (2) community service; (3) class attendance; (4) restitution; (5) removal from University housing; (6) suspension from specific courses and activities; (7) suspension; (8) expulsion. The sanctions of suspension and expulsion could only be imposed for violent or dangerous acts, repeated offenses, or a willful failure to comply with a lesser sanction. The University President could set aside or lessen any sanction.

## D. *Interpretive Guide*

Shortly after the promulgation of the policy in the fall of 1988, the University Office of Affirmative Action issued an interpretive guide (Guide) entitled *What Students Should Know about Discrimination and Discriminatory Harassment by*
858 *Students in the University Environment.* The Guide purported to be an authoritative *858 interpretation of the Policy and provided examples of sanctionable conduct. These included:

> A flyer containing racist threats distributed in a residence hall.
>
> Racist graffiti written on the door of an Asian student's study carrel.
>
> A male student makes remarks in class like "Women just aren't as good in this field as men," thus creating a hostile learning atmosphere for female classmates.

> Students in a residence hall have a floor party and invite everyone on their floor except one person because they think she might be a lesbian.
>
> A black student is confronted and racially insulted by two white students in a cafeteria.
>
> Male students leave pornographic pictures and jokes on the desk of a female graduate student.
>
> Two men demand that their roommate in the residence hall move out and be tested for AIDS.

In addition, the Guide contained a separate section entitled "You are a harasser when ..." which contains the following examples of discriminatory conduct:

> You exclude someone from a study group because that person is of a different race, sex, or ethnic origin than you are.
>
> You tell jokes about gay men and lesbians.
>
> Your student organization sponsors entertainment that includes a comedian who slurs Hispanics.
>
> You display a confederate flag on the door of your room in the residence hall.
>
> You laugh at a joke about someone in your class who stutters.
>
> You make obscene telephone calls or send racist notes or computer messages.
>
> You comment in a derogatory way about a particular person or group's physical appearance or sexual orientation, or their cultural origins, or religious beliefs.

It was not clear whether each of these actions would subject a student to sanctions, although the title of the section suggests that they would. It was also unclear why these additional examples were listed separately from those in the section entitled "What is Discriminatory Harassment."

According to the University, the Guide was withdrawn at an unknown date in the winter of 1989, because "the information in it was not accurate." The withdrawal had not been announced publicly as of the date this case was filed.[7]

## IV. STANDING

Doe is a psychology graduate student. His specialty is the field of biopsychology, which he describes as the interdisciplinary study of the biological bases of individual differences in personality traits and mental abilities. Doe said that certain controversial theories positing biologically-based differences between sexes and races might be perceived as "sexist" and "racist" by some students, and he feared that discussion of such theories might be sanctionable under the Policy. He asserted that his right to freely and openly discuss these theories was impermissibly chilled, and he requested that the Policy be declared unconstitutional and enjoined on the grounds of vagueness and overbreadth.

The University in response questioned Doe's standing to challenge the Policy, saying that it has never been applied to sanction classroom discussion of legitimate ideas and that Doe did not demonstrate a credible threat of enforcement as to himself. The University also asserts that Doe could not base his claim on the free speech interests of unspecified third parties. These arguments served only to diminish the credibility of the University's argument on the merits because it
859 appeared that it *859 sought to avoid coming to grips with the constitutionality of the Policy.

Article III of the Constitution limits the judicial power of federal courts to live cases and controversies. Traditionally, federal courts have interpreted this limitation to bar a party from maintaining a lawsuit unless the party had a sufficient stake in the outcome "as to assure that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr,* 369 U.S. 186, 204, 82 S.Ct. 691, 1703, 7 L.Ed.2d 663 (1962). To establish such an interest, a litigant must show that he or she has personally suffered some actual or threatened injury from the putatively illegal conduct of the defendant, that the injury could fairly be traced to the illegal conduct, and that it would be redressed by a favorable decision. *Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982). The challenged conduct

must cause or threaten to cause a direct injury, *Laird v. Tatum,* 408 U.S. 1, 14, 92 S.Ct. 2318, 2326, 33 L.Ed.2d 154 (1972), which is distinct and palpable, *Allen v. Wright,* 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984). Doe clearly met this standard.

It is well settled that an individual has standing to challenge the constitutionality of a penal statute if he or she can demonstrate a realistic and credible threat of enforcement. *Steffel v. Thompson,* 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974). The mere possibility that a person might be subject to the sanctions of a statute is insufficient. *United Presbyterian Church in the U.S.A. v. Reagan,* 738 F.2d 1375 (D.C.Cir.1984). Rather, the threat of enforcement must be specific and direct and against a particular party. *Houston v. Hill,* 482 U.S. 451, 459 n. 7, 107 S.Ct. 2502, 2508 n. 7, 96 L.Ed.2d 398 (1987). It is not necessary, however, that an individual first be exposed to prosecution in order to have standing to challenge a statute which is claimed to deter the exercise of constitutional rights. *Doe v. Bolton,* 410 U.S. 179, 188, 93 S.Ct. 739, 745, 35 L.Ed.2d 201 (1973).

Were the Court to look only at the plain language of the Policy, it might have to agree with the University that Doe could not have realistically alleged a genuine and credible threat of enforcement. The Policy prohibited conduct which "stigmatizes or victimizes" students on the basis of "race, ethnicity, religion, sex, sexual orientation" and other invidious factors. However, the terms "stigmatize" and "victimize" are not self defining.[8] These words can only be understood with reference to some exogenous value system. What one individual might find victimizing or stigmatizing, another individual might not. Accordingly, the likelihood of a complaint being filed in response to Doe's anticipated classroom comments would be speculative at best. In addition, even if a complaint was filed, the Policy requires that considerations of freedom of speech and academic freedom be given due consideration by the Policy Administrator in determining whether a formal hearing is warranted. Even if a student were to find Doe's views victimizing or stigmatizing, the Policy Administrator might well conclude that his speech was protected by the First Amendment and refuse to take any action. Thus, if the plain language of the policy were all the Court had before it, it would probably conclude that Doe had failed to demonstrate a reasonable probability that the Policy would be construed to cover his anticipated speech.

The slate was not so clean, however. The Court had before it not only the terms of the Policy, but also its legislative history,
860 the Guide, and experiences gleaned from a year of enforcement. The record clearly shows that there existed a realistic *860 and credible threat that Doe could be sanctioned were he to discuss certain biopsychological theories.

The legislative history demonstrated that the Policy was originally conceived as a remedy for racially insensitive and derogatory remarks which students found offensive. The Acting President's December 14, 1987 memorandum to the University's Executive Officers stated that the proposed anti-harassment policy would sanction any "remarks which seriously offend many individuals beyond the immediate victim, and which, therefore detract from the necessary educational climate of a campus." The University pointed out that the December 14 Memorandum was simply a tentative starting point for discussion and the Policy went though numerous drafts before it reached its final form. This may have well been so. However, the Memorandum nevertheless illustrated the *intent,* never subsequently contradicted, underlying the Policy and the University's general approach to the problems it perceived. Nothing in the legislative materials filed with the Court suggested that the Acting President's theoretical approach was substantially altered as the Policy developed. On the contrary, as late as February 2, 1988, the University attorney who researched the law and assisted in the drafting of the Policy, wrote a memorandum in which he conceded that merely offensive speech was constitutionally protected, but declared that

> [w]e cannot be frustrated by the reluctance of the courts and the common law to recognize the personal damage that is caused by discriminatory speech, nor should our policy attempt to conform to traditional methods of identifying harmful speech. Rather the University should identify and prohibit that speech that causes damage to individuals within the community.

The record before the Court thus indicated that the drafters of the policy intended that speech need only be offensive to be sanctionable.

The Guide also suggested that the kinds of ideas Doe wished to discuss would be sanctionable. The Guide was the University's authoritative interpretation of the Policy. It explicitly stated that an example of sanctionable conduct would include:

> A male student makes remarks in class like "Women just aren't as good in this field as men," thus creating a hostile learning atmosphere for female classmates.

Doe said in an affidavit that he would like to discuss questions relating to sex and race differences in his capacity as a teaching assistant in Psychology 430, Comparative Animal Behavior. He went on to say:

> An appropriate topic for discussion in the discussion groups is sexual differences between male and female mammals, including humans. [One] ... hypothesis regarding sex differences in mental abilities is that men as a group do better than women in some spatially related mental tasks partly because of a biological difference. This may partly explain, for example, why many more men than women chose to enter the engineering profession.

Doe also said that some students and teachers regarded such theories as "sexist" and he feared that he might be charged with a violation of the Policy if he were to discuss them. In light of the statements in the Guide, such fears could not be dismissed as speculative and conjectural. The ideas discussed in Doe's field of study bear sufficient similarity to ideas denounced as "harassing" in the Guide to constitute a realistic and specific threat of prosecution.

The University argued that it had withdrawn the Guide on the grounds that it contained some "inaccuracies." However, at best, this decision was conveyed only to department heads and other responsible officials and, as noted, had not been announced to the general University community at the time this lawsuit was filed. For the purposes of determining Doe's standing, the University's action came too late to render Doe's fear of enforcement illusory. *See United States v. W.T. Grant & Co.*, 345 U.S. 629, 73 S.Ct. 894, 97 L.Ed. 1303 (1953).

861 *861 Finally, the record of the University's enforcement of the Policy over the past year suggested that students in the classroom and research setting who offended others by discussing ideas deemed controversial could be and were subject to discipline. A review of the University's discriminatory harassment complaint files suggested that on at least three separate occasions, students were disciplined or threatened with discipline for comments made in a classroom setting. These are discipline files 88-12-21, 88-9-05, and 88-9-07, discussed *infra.* At least one student was subject to a formal hearing because he stated in the context of a social work research class that he believed that homosexuality was a disease that could be psychologically treated. As will be discussed below, the Policy was enforced so broadly and indiscriminately, that plaintiff's fears of prosecution were entirely reasonable. Accordingly, the Court found that Doe had standing to challenge the policy.[9]

## V. VAGUENESS AND OVER-BREADTH

Doe initially moved for a preliminary injunction against the Policy on the grounds that it was unconstitutionally vague and overbroad and that it chilled speech and conduct protected by the First Amendment. The University in response said that the Policy has never been applied to reach protected speech and a preliminary injunction should therefore be denied. At the August 25, 1989 hearing on Doe's motion, the Court, without objection, consolidated the hearing on the motion with the trial on the merits pursuant to Fed.R.Civ.P. 65(a)(2).[10] This obviated the need to consider whether Doe had made the requisite showing to warrant the issuance of a preliminary injunction. *See Mason County Medical Association v. Knebel*, 563 F.2d 256 (6th Cir. 1977).

## A. *Scope of Permissible Regulation*

Before inquiring whether the policy is impermissibly vague and overbroad, it would be helpful to first distinguish between verbal conduct and verbal acts that are generally protected by the First Amendment and those that are not. It is the latter class of behavior that the University may legitimately regulate.

Although the line is sometimes difficult to draw with precision, the Court must distinguish at the outset between the First Amendment protection of so-called "pure speech" and mere conduct. *See* L. Tribe, *Constitutional Law* sec. 12-7 (2d Ed.1988). As to the latter, it can be safely said that most extreme and blatant forms of discriminatory conduct are not protected by the First Amendment, and indeed are punishable by a variety of state and federal criminal laws and subject to civil actions. Discrimination in employment, education, and government benefits on the basis of race, sex, ethnicity, and religion are prohibited by the constitution and both state and federal statutes.[11] *See, e.g.,* U.S. Const. amends. V, XIV; Mich Const. art. I, sec. 2; 42 U.S.C. sec. 2000e-16 (employment); Mich.Stat.Ann. sec. 3.548(202) [M.C.L.A. sec. 37.2202]
862 (employment); 42 U.S.C. sec. 2000c (education); Mich. Const. art. VIII, sec. 2 (education); 42 U.S.C. sec. 2000d *862

(government benefits). In addition, the state provides criminal penalties and civil remedies for assault and battery, Mich. Stat.Ann. secs. 28.276-28.278 [M.C.L.A. secs. 750.81-750.83]; Mich.Stat.Ann. sec. 28.344(2) [M.C.L.A. sec. 750.1476] (physical assault for purposes of ethnic intimidation).[12] *Tinkler v. Richter,* 295 Mich. 396, 295 N.W. 201 (1940) (civil action for assault and battery), and vandalism and property damage, Mich.Stat.Ann. 28.609(1) [M.C.L.A. sec. 750.377a]; Mich.Stat.Ann. sec. 28.344(2) [M.C.L.A. sec. 750.1476] (property damage and destruction for purposes of ethnic intimidation); *Thoma v. Tracy Motor Sales,* 360 Mich. 434, 104 N.W.2d 360 (1960) (civil action for property destruction). Federal law imposes civil and criminal sanctions against persons depriving or conspiring to deprive others of rights guaranteed by the United States constitution. 42 U.S.C. secs. 1983, 1985 (civil); 18 U.S.C. secs. 241-242 (criminal).

Many forms of sexually abusive and harassing conduct are also sanctionable. These would include abduction, Mich.Stat. Ann. secs. 28.201-28.202 [M.C.L.A. secs. 750.11-750.12], rape, and other forms of criminal sexual conduct, Mich.Stat.Ann. sec. 28.788; *Totten v. Totten,* 172 Mich. 565, 138 N.W. 257 (1912) (civil action for rape). The dissemination of legally obscene materials is also a crime under state law. Mich.Stat.Ann. sec. 28.579 [M.C.L.A. sec. 750.347]. In addition, a civil remedy exists for women who are subjected to demands for sexual favors by employers as an express or implied *quid pro quo* for employment benefits. *Meritor Savings Bank v. Vinson,* 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986). Minorities or women who are exposed to such extreme and pervasive workplace harassment as to create a hostile or offensive working environment are also entitled to civil damages. *Id.* (and cases cited therein). The First Amendment presents no obstacle to the establishment of internal University sanctions as to any of these categories of conduct, over and above any remedies already supplied by state or federal law.

While the University's power to regulate so-called pure speech is far more limited, *see United States v. O'Brien,* 391 U.S. 367, 376-77, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968), certain categories can be generally described as unprotected by the First Amendment. It is clear that so-called "fighting words" are not entitled to First Amendment protection. *Chaplinsky v. New Hampshire,* 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942). These would include "the lewd and obscene, the profane, the libelous, and the insulting or `fighting words' — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.* at 572, 62 S.Ct. at 769. Under certain circumstances racial and ethnic epithets, slurs, and insults might fall within this description and could constitutionally be prohibited by the University. In addition, such speech may also be sufficient to state a claim for common law intentional infliction of emotional distress. *Ledsinger v. Burmeister,* 114 Mich. App. 12, 18-19, 318 N.W.2d 558 (1982). Credible threats of violence or property damage made with the specific intent to harass or intimidate the victim because of his race, sex, religion, or national origin is punishable both criminally and civilly under state law. Mich.Stat.Ann. sec. 28.344(2) [M.C.L.A. sec. 750.1476]. Similarly, speech which has
863 the effect of inciting imminent lawless action and which is likely to incite such action may also be lawfully punished. *863 *Brandenburg v. Ohio,* 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969). Civil damages are available for speech which creates a hostile or abusive working environment on the basis of race or sex. *Meritor, supra.* Legally obscene speech is unprotected by the First Amendment, *Miller v. California,* 413 U.S. 15, 22, 93 S.Ct. 2607, 2613, 37 L.Ed.2d 419 (1973), as are materials involving the sexual exploitation of children. *New York v. Ferber,* 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). Similarly, speech which is "vulgar," "offensive," and "shocking" is not entitled to absolute constitutional protection in all circumstances. *Bethel School District No. 403 v. Fraser,* 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986); *FCC v. Pacifica Foundation, supra.* Certain kinds of libel and slander are also not protected. *Dun & Bradstreet v. Greenmoss Builders,* 472 U.S. 749, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985), including possibly group libel, *Beauharnais v. Illinois,* 343 U.S. 250, 72 S.Ct. 725, 96 L.Ed. 919 (1952). Finally, the University may subject all speech and conduct to reasonable and nondiscriminatory time, place, and manner restrictions which are narrowly tailored and which leave open ample alternative means of communication. *Heffron v. International Society for Krishna Consciousness,* 452 U.S. 640, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981). If the Policy had the effect of only regulating in these areas, it is unlikely that any constitutional problem would have arisen.

What the University could not do, however, was establish an anti-discrimination policy which had the effect of prohibiting certain speech because it disagreed with ideas or messages sought to be conveyed. *Texas v. Johnson,* ___ U.S. ___, ___, 109 S.Ct. 2533, 105 L.Ed.2d 342, 360 (1989); *Chicago Police Department v. Mosley,* 408 U.S. 92, 95, 92 S.Ct. 2286, 2289-90, 33 L.Ed.2d 212 (1972); *Cohen v. California,* 403 U.S. 15, 24, 91 S.Ct. 1780, 1787, 29 L.Ed.2d 284 (1971); *NAACP v. Button,* 371 U.S. 415, 445, 83 S.Ct. 328, 852, 9 L.Ed.2d 405 (1963); *Terminiello v. Chicago,* 337 U.S. 1, 4, 69 S.Ct. 894, 895, 93 L.Ed. 1131 (1949). As the Supreme Court stated in *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 642, 63 S.Ct. 1178, 1187, 87 L.Ed. 1628 (1943):

> If there is any star fixed in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

Nor could the University proscribe speech simply because it was found to be offensive, even gravely so, by large numbers of people. *Texas v. Johnson, supra,* ___ U.S. at ___, 109 S.Ct. at 2544-45, 105 L.Ed.2d at 360; *Hustler Magazine v. Falwell,* 485 U.S. 46, 55-56, 108 S.Ct. 876, 882, 99 L.Ed.2d 41 (1988); *City Counsel of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 804, 104 S.Ct. 2118, 2128, 80 L.Ed.2d 772 (1984); *Federal Communications Commission v. Pacifica Foundation,* 438 U.S. 726, 745-46, 98 S.Ct. 3026, 3038-39, 57 L.Ed.2d 1073 (1978); *Collin v. Smith,* 578 F.2d 1197, 1205-07 (7th Cir.), *cert. denied* 439 U.S. 916, 99 S.Ct. 291, 58 L.Ed.2d 264 (1978). As the Supreme Court noted in *Street v. New York,* 394 U.S. 576, 592, 89 S.Ct. 1354, 1365, 22 L.Ed.2d 572 (1969):

> It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers. *See e.g. Cox v. Louisiana (I),* [379 U.S. 536 [85 S.Ct. 453, 13 L.Ed.2d 471] (1965)]; *Edwards v. South Carolina,* [372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963)]; *Terminiello v. Chicago,* [337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949)]; *cf. Cantwell v. Connecticut,* 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940).

These principles acquire a special significance in the university setting, where the free and unfettered interplay of competing views is essential to the institution's educational mission. *Keyishian v. Board of Regents,* 385 U.S. 589, 603, 87 S.Ct. 675, 683, 17 L.Ed.2d 629 (1967); *Sweezy v. New Hampshire,* 354 U.S. 234, 250, 77 S.Ct. 1203, 1211-12, 1 L.Ed.2d 1311 (1957).
864 With these general rules in mind, the Court can now consider *864 whether the Policy sweeps within its scope speech which is otherwise protected by the First Amendment.

## B. *Overbreadth*

### 1.

Doe claimed that the Policy was invalid because it was facially overbroad. It is fundamental that statutes regulating First Amendment activities must be narrowly drawn to address only the specific evil at hand. *Broadrick v. Oklahoma,* 413 U.S. 601, 611, 93 S.Ct. 2908, 2915, 37 L.Ed.2d 830 (1973). "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP v. Button, supra* 371 U.S. at 433, 83 S.Ct. at 845-46. A law regulating speech will be deemed overbroad if it sweeps within its ambit a substantial amount of protected speech along with that which it may legitimately regulate. *Id.* 413 U.S. at 612, 93 S.Ct. at 2915; *Houston v. Hill,* 482 U.S. 451, 458-60, 107 S.Ct. 2502, 2507-08, 96 L.Ed.2d 398 (1985); *Kolender v. Lawson,* 461 U.S. 352, 359 n. 8, 103 S.Ct. 1855, 1859 n. 8, 75 L.Ed.2d 903 (1983); *Gooding v. Wilson,* 405 U.S. 518, 521-22, 92 S.Ct. 1103, 1105-06, 31 L.Ed.2d 408 (1972).

The Supreme Court has consistently held that statutes punishing speech or conduct solely on the grounds that they are unseemly or offensive are unconstitutionally overbroad. In *Houston v. Hill, supra,* the Supreme Court struck down a City of Houston ordinance which provided that "[i]t shall be unlawful for any person to assault or strike or in any manner oppose, molest, and abuse or interrupt any policeman in the execution of his duty." The Supreme Court also found that the ordinance was overbroad because it forbade citizens from criticizing and insulting police officers, although such conduct was constitutionally protected. *Id.* 482 U.S. at 460-65, 107 S.Ct. at 2508-10. The fact that the statute also had a legitimate scope of application in prohibiting conduct which was clearly unprotected by the First Amendment was not enough to save it. In *Gooding v. Wilson, supra,* the Supreme Court struck down a Georgia statute which made it a misdemeanor for "[a]ny person [to], without provocation, use to or of another, and in his presence ... opprobrious words or abusive language, tending to cause a breach of the peace." The Supreme Court found that this statute was overbroad as well, because it punished speech which did not rise to the level of "fighting words," as defined in *Chaplinsky v. New Hampshire, supra.* The Supreme Court struck down a similar ordinance in *Lewis v. New Orleans,* 415 U.S. 130, 94 S.Ct. 970, 39 L.Ed.2d 214 (1974), on the same grounds. In *Papish v. University of Missouri,* 410 U.S. 667, 93 S.Ct. 1197, 35 L.Ed.2d 618 (1973), the Supreme Court ordered the reinstatement of a university student expelled for distributing an underground newspaper sporting the headline "Motherfucker acquitted" on the grounds that "the mere dissemination of ideas — no matter how offensive to good taste — on a state university campus may not be shut off in the name alone of conventions of decency." *Id.* at 670, 93 S.Ct. at 1199.

Although the Supreme Court acknowledged that reasonable restrictions on the time, place, and manner of distribution might have been permissible, "the opinions below show clearly that [plaintiff] was dismissed because of the disapproved *content* of the newspaper." *Id.* Most recently, in *Texas v. Johnson, supra,* the Supreme Court invalidated a Texas statute prohibiting burning of the American flag on the grounds that there was no showing that the prohibited conduct was likely to incite a breach of the peace. These cases stand generally for the proposition that the state may not prohibit broad classes of speech, some of which may indeed be legitimately regulable, if in so doing a substantial amount of constitutionally protected conduct is also prohibited. This was the fundamental infi mity of the Policy.

## 2.

The University repeatedly argued that the Policy did not apply to speech that is protected by the First Amendment. It urged the Court to disregard the Guide as "inaccurate" and look instead to "the manner in which the Policy has been interpreted
865 and applied by those charged with its *865 enforcement." However, as applied by the University over the past year, the Policy was consistently applied to reach protected speech.

On December 7, 1988, a complaint was filed against a graduate student in the School of Social Work alleging that he harassed students based on sexual orientation and sex. The basis for the sexual orientation charge was apparently that in a research class, the student openly stated his belief that homosexuality was a disease and that he intended to develop a counseling plan for changing gay clients to straight. *See* Discipline File 88-12-21, described *supra.* He also related to other students that he had been counseling several of his gay patients accordingly. The student apparently had several heated discussions with his classmates over the validity and morality of his theory and program. On January 11, 1989, the Interim Policy Administrator wrote to the student informing him that following an investigation of the complaints, there was sufficient evidence to warrant a formal hearing on the charges of sex and sexual orientation harassment.[13] A formal hearing on the charges was held on January 28, 1989. The hearing panel unanimously found that the student was guilty of sexual harassment but refused to convict him of harassment on the basis of sexual orientation. The panel stated:

> In a divided decision the hearing panel finds that the evidence available to the panel indicates that ____ did not harass students on the basis of sexual orientation under the strict definition of "The University of Michigan Policy on Discrimination and Discriminatory Harassment by Students in the University Environment." In accordance with First Amendment rights to free speech and the University's policy of academic freedom, ____ did not violate the policy by discussing either the origins or "curability" of homosexuality in the School of Social Work.

Although the student was not sanctioned over the allegations of sexual orientation harassment, the fact remains that the Policy Administrator — the authoritative voice of the University on these matters — saw no First Amendment problem in forcing the student to a hearing to answer for allegedly harassing statements made in the course of academic discussion and research. Moreover, there is no indication that had the hearing panel convicted rather than acquitted the student, the University would have interceded to protect the interests of academic freedom and freedom of speech.

A second case, which was informally resolved, also demonstrated that the University did not exempt statements made in the course of classroom academic discussions from the sanctions of the policy. On September 28, 1988, a complaint was filed against a student in an entrepreneurship class in the School of Business Administration for reading an allegedly homophobic limerick during a scheduled class public-speaking exercise which ridiculed a well known athlete for his presumed sexual orientation. Complaint No. 88-9-05. The Policy Administrator was able to persuade the perpetrator to attend an educational "gay rap" session, write a letter of apology to the *Michigan Daily,* and apologize to his class and the matter was dropped. No discussion of the possibility that the limerick was protected speech appears in the file or in the Administrator's notes.

866 A third incident involved a comment made in the orientation session of a preclinical *866 dentistry class. The class was widely regarded as one of the most difficult for second year dentistry students. To allay fears and concerns at the outset, the class was broken up into small sections to informally discuss anticipated problems. During the ensuing discussion, a student stated that "he had heard that minorities had a difficult time in the course and that he had heard that they were not treated fairly." Complaint No. 88-9-07. A minority professor teaching the class filed a complaint on the grounds that the comment was unfair and hurt her chances for tenure. Following the filing of the complaint, the student was "counseled" about the

existence of the policy and agreed to write a letter apologizing for making the comment without adequately verifying the allegation, which he said he had heard from his roommate, a black former dentistry student.[14]

The manner in which these three complaints were handled demonstrated that the University considered serious comments made in the context of classroom discussion to be sanctionable under the Policy. The innocent intent of the speaker was apparently immaterial to whether a complaint would be pursued. Moreover, the Administrator generally failed to consider whether a comment was protected by the First Amendment before informing the accused student that a complaint had been filed. The Administrator instead attempted to persuade the accused student to accept "voluntary" sanctions. Behind this persuasion was, of course, the subtle threat that failure to accept such sanctions might result in a formal hearing. There is no evidence in the record that the Administrator ever declined to pursue a complaint through attempted mediation because the alleged harassing conduct was protected by the First Amendment. Nor is there evidence that the Administrator ever informed an accused harasser during mediation negotiations that the complained of conduct might be protected. The Administrator's manner of enforcing the Policy was constitutionally indistinguishable from a full blown prosecution. The University could not seriously argue that the policy was never interpreted to reach protected conduct. It is clear that the policy was overbroad both on its face and as applied.[15]

## C. *Vagueness*

Doe also urges that the policy be struck down on the grounds that it is impermissibly vague. A statute is unconstitutionally vague when "men of common intelligence must necessarily guess at its meaning." *Broadrick, supra* 413 U.S. at 607, 93 S.Ct. at 2913. A statute must give adequate warning of the conduct which is to be prohibited and must set out explicit standards for those who apply it. *Id.* "No one may be required at the peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Lanzetta v. New Jersey,* 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888 (1939). These considerations apply with particular force where the challenged statute acts to inhibit freedoms affirmatively protected by the constitution. *Smith v. Goguen,* 415 U.S. 566, 573, 94 S.Ct. 1242, 1247, 39 L.Ed.2d 605 (1974). However, the chilling effect caused by an overly vague statute must be both real and substantial, *Young v. American Mini-Theatres,* 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), and a
867 narrowing construction must be unavailable before a court will set it *867 aside, *Screws v. United States,* 325 U.S. 91, 98, 65 S.Ct. 1031, 1033, 89 L.Ed. 1495 (1945).

Looking at the plain language of the Policy, it was simply impossible to discern any limitation on its scope or any conceptual distinction between protected and unprotected conduct. The structure of the Policy was in two parts; one relates to cause and the other to effect. Both cause and effect must be present to state a prima facie violation of the Policy. The operative words in the cause section required that language must "stigmatize" or "victimize" an individual. However, both of these terms are general and elude precise definition. Moreover, it is clear that the fact that a statement may victimize or stigmatize an individual does not, in and of itself, strip it of protection under the accepted First Amendment tests.

The first of the "effects clauses" stated that in order to be sanctionable, the stigmatizing and victimizing statements had to "involve an express or implied threat to an individual's academic efforts, employment, participation in University sponsored extracurricular activities or personal safety." It is not clear what kind of conduct would constitute a "threat" to an individual's academic efforts. It might refer to an unspecified threat of future retaliation by the speaker. Or it might equally plausibly refer to the threat to a victim's academic success because the stigmatizing and victimizing speech is so inherently distracting. Certainly the former would be unprotected speech. However, it is not clear whether the latter would.

Moving to the second "effect clause," a stigmatizing or victimizing comment is sanctionable if it has the purpose or reasonably foreseeable effect of interfering with an individual's academic efforts, etc. Again, the question is what conduct will be held to "interfere" with an individual's academic efforts. The language of the policy alone gives no inherent guidance. The one interpretive resource the University provided was withdrawn as "inaccurate," an implicit admission that even the University itself was unsure of the precise scope and meaning of the Policy.

During the oral argument, the Court asked the University's counsel how he would distinguish between speech which was merely offensive, which he conceded was protected, and speech which "stigmatizes or victimizes" on the basis of an invidious factor. Counsel replied "very carefully." The response, while refreshingly candid, illustrated the plain fact that the University never articulated any principled way to distinguish sanctionable from protected speech. Students of common understanding were necessarily forced to guess at whether a comment about a controversial issue would later be found to

be sanctionable under the Policy. The terms of the Policy were so vague that its enforcement would violate the due process clause. *See* *Cramp v. Board of Public Instruction,* 368 U.S. 278, 285-88, 82 S.Ct. 275, 279-281, 7 L.Ed.2d 285 (1961).

## VI. CONCLUSION.

## A.

The foregoing constitutes the Court's findings of fact and conclusions of law. Fed.R.Civ.P. 52. However, at this juncture, a few additional observations of a general nature would seem to be in order. As the Court noted at the hearing on August 25, 1989, there is nothing in the record to suggest that the University looked at the experience of any other university in developing its approach to the problem of discriminatory harassment. Had it done so, it might have discovered that Yale University, a private institution not subject to the strictures of the First Amendment, faced a similar dilemma pitting its efforts to promote equality against its commitment to free speech. In 1986, a sophomore at Yale was put on probation for two years by a University discipline board for disseminating a malicious flier intended to ridicule the homosexual community. The board eventually reversed the sanction, but only after a second hearing was held at which the student was represented by
868 historian C. Vann Woodward, author of the University's 1975 report on free speech. N.Y. *868 Times, Oct. 15, 1986, at A27. That report concluded that "freedom of expression is a paramount value, more important than civility or rationality." N.Y. Times, Sept. 22, 1986, at B4. Writing about the case, Professor Woodward observed:

> It simply seems unnatural to make a fuss about the rights of a speaker who offends the moral or political convictions passionately held by a majority. The far more natural impulse is to stop the nonsense, shut it up, punish it — anything but defend it. But to give rein to that inclination would be to make the majority the arbiters of truth for all. Furthermore, it would put the universities into the business of censorship.

New York Times, Oct. 15, 1986, at A27.

While the Court is sympathetic to the University's obligation to ensure equal educational opportunities for all of its students, such efforts must not be at the expense of free speech. Unfortunately, this was precisely what the University did. From the Acting President's December 14 memorandum forward to the adoption of the Policy and continuing through the August 25 hearing, there is no evidence in the record that any officials at the University ever seriously attempted to reconcile their efforts to combat discrimination with the requirements of the First Amendment. The apparent willingness to dilute the values of free speech is ironic in light of the University's previous statements of policy on this matter. In 1977, the Regents adopted the "Statement on Freedom of Speech and Artistic Expression: The Rights and Obligations of Speakers, Performers, Audience Members, and Protesters at the University of Michigan" (Statement) which "reaffirm[ed] formally [the University's] deep and lasting commitment to freedom of speech and artistic expression." The Statement provides in part that

> freedom of speech must not ordinarily be restricted, governed or curtailed in any way by content except where the law, as interpreted by the Supreme Court of Michigan or the Supreme Court of the United States, holds that such an expression does not fall within constitutionally protected free speech. In all instances, the University authorities should act with maximum constraint, even in the face of obvious bad taste or provocation. The belief that some opinion is pernicious, false, or in any other way detestable cannot be grounds for its suppression.[16]

Needless to say, the philosophy expressed in the Statement is diametrically opposed to that reflected in the Acting President's December 14 Memorandum. Apparently, no one involved in the drafting process noted the apparent inconsistency with the Regents' views as expressed in the Statement.

Throughout the case, the University's counsel strenuously urged that First Amendment concerns held a top priority in the development and administration of the Policy. Counsel repeatedly argued that the University interpreted the Policy to reach conduct such as racial slurs and epithets in the classroom directed at an individual victim. However, as the Court observed in its August 25, 1989 bench opinion,

> what we have heard here this morning ... from University counsel is a revisionist view of the Policy on Discrimination and Discriminatory Harassment by Students in the University Environment, and it is a view and interpretation of the Policy that was not in the minds of the legislators when it was adopted. And there is

> nothing in the record that has been presented to the Court which suggests that this was an appropriate interpretation of the policy.

Not only has the administrative enforcement of the Policy been wholly inconsistent with counsel's interpretation, but withdrawal of the Guide, *see supra* at 13, and the eleventh hour suspension of section 1(c), *see supra* at 8, suggests that the University had no idea what the limits of the Policy were and it was essentially making up the rules as it went along.

869 *869 **B.**

In his famous treatise on constitutional law, Thomas Cooley, Justice of the Michigan Supreme Court and Professor of Law at the University's Law School, came out as an early and forceful proponent of an expansive interpretation of the First Amendment. He reasoned that even if speech

> exceed[s] all the proper bounds of moderation, the consolation must be that the evil likely to spring from the violent discussion will probably be less, and its correction by public sentiment more speedy, than if the terrors of the law were brought to bear to prevent the discussion.

T. Cooley, *A Treatise on the Constitutional Limitations* 429 (Da Capo ed. 1972) (1st ed. 1868). This observation appears as compelling today as when it was first written over one hundred and twenty years ago.

## ADDENDUM

Inexplicably the Court did not become aware of a conference on legal story telling at the University's Law School in April 1989 until after its Opinion was docketed. Important for consideration of a broader perspective of the issues put by the Policy and the Court's holding of unconstitutionality under the First Amendment is a paper delivered at the conference by Mari J. Matsuda, an associate professor of law at the William S. Richardson School of Law at the University of Hawaii: *Public Response To Racist Speech: Considering the Victim's Story,* 87 Mich.L.Rev. 2320, August 1989.[*] Professor Matsuda's description of her purpose amply describes the significance of the paper:

> This Article attempts to begin a conversation about the first amendment that acknowledges both the civil libertarian's fear of tyranny and the victims' experience of loss of liberty in a society that tolerates racist speech. It suggests criminalization of a narrow, explicitly defined class of racist hate speech, to provide public redress for the most serious harm, while leaving many forms of racist speech to private remedies.... This is not an easy legal or moral puzzle, but it is precisely in these places where we feel conflicting tugs at heart and mind that we have the most work to do and the most knowledge to gain.

[1] Plaintiff proceeded under the pseudonym "John Doe" to preserve his privacy and protect himself from any adverse publicity arising from this case. The University did not contest plaintiff's right to proceed anonymously.

Doe was represented by counsel provided by the American Civil Liberties Union. His attorneys are to be commended for the consistently high quality of the representation they provided Doe in this case.

[2] The reasons for the Court's decision were stated on the record at a hearing held on August 25, 1989. At that time, the Court stated that it would issue a more detailed written opinion at a later date. To the extent that this opinion is at variance with the Court's August 25, 1989 bench opinion, it is the written opinion which controls. *See* *Schmidt v. Plains Electric Inc.*, 281 N.W.2d 794 (N.D.1979).

[3] Regents' By-law 2.01 provides that in addition to other duties and functions, the President of the University shall exercise such general powers as to

general oversight of teaching and research programs; the libraries, museums, and other supporting services; the general welfare of the faculty and supporting staffs; the business and financial welfare of the University; and the maintenance of health, diligence, and order among the students.

[4] Regents' By-law 7.02, adopted in 1985, established the University Council, a formal body composed of faculty, students, and administrators, charged with the responsibility for drafting uniform regulations governing the conduct of members of the community. As of January, 1988, the University Council had failed to act. This was apparently the reason why the Regents bypassed the University Council in formulating the Policy.

[5] This equivocation is attributable to the fact that consultations with law professors were unaccompanied by the exchange of any formal correspondence or memoranda.

[6] The constitutionality of the Policy as it relates to verbal conduct and verbal behavior in University housing is not raised in the complaint. The standard provisions of the University housing lease are not part of the record.

[7] The Policy was published in pamphlet form with a blue cover and a yellow slash down the center. The Guide was published in pamphlet form with the opposite color scheme. The University's colors are maize and blue. The graphic layout of the Policy and Guide pamphlets served to reinforce the Court's view that the two statements were integrally related. Indeed, at the hearing on August 25, 1989, the Court observed that the withdrawal of the Guide while retaining the Policy was like taking the maize out of the "maize and blue."

[8] "Stigmatize" is defined in *The American Heritage Dictionary* 1266 (1978) as "1. To characterize or brand as disgraceful or ignominious mark with stigma or brand. 2. To brand or mark with a stigma or stigmata. 3. To cause stigmata to appear on." "Victimize" is defined as "1. To subject to swindle or fraud; to cause discomfort or suffering to. 2. To make a victim of as if by slaying." *Id.* at 1428.

[9] In view of the fact that there was a substantial probability that the Policy might be enforced against Doe, there was no need to consider whether he has standing to assert the rights of third parties, *see, e.g., Barrows v. Jackson,* 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586 (1953), or whether the mere existence of the Policy has sufficiently "chilled" the intellectual atmosphere of the University as to make out a concrete injury-in-fact, *see, e.g., Sierra Club v. Morton,* 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972).

[10] The University reserved the right to supplement the record to clarify any disputed factual issues, which it subsequently did. Doe chose not to respond. Nothing in the University's clarification papers materially changed any of the facts the Court relied upon in reaching its decision.

[11] There are no federal statutory or constitutional provisions against discrimination on the basis of sexual orientation or Vietnam Veteran status. *See Bowers v. Hardwick,* 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986). This hiatus does not mean that the University may not adopt regulations more protective than existing law, provided, of course, such regulation does not otherwise offend the state or federal constitutions.

[12] Recently, the Michigan legislature enacted a law making it a criminal offense to commit an act of "ethnic intimidation," which is defined as the causing of physical contact with another, the damaging of real or personal property, or making a credible threat to do so with the specific intent to "intimidate or harass another person because of that person's race, color, religion, gender, or national origin[.]" Mich.Stat.Ann. sec. 28.344(2) [M.C.L.A. sec. 750.1476]. The statute prescribes a maximum penalty of not more than two years imprisonment or $5,000 fine or both. It also establishes a civil remedy for such conduct entitling a successful plaintiff to treble damages or $2,000, whichever is greater, and attorney's fees.

For a survey of similar anti-hate crime legislation in other states, *see* Anti-Defamation League, *Hate Crimes Statutes: A Response to Anti-Semitism, Vandalism, and Violent Bigotry* (1988).

[13] The letter stated in part:

One type of complaint alleges that you have engaged in discrimination and/or discriminatory harassment on the basis of sexual orientation. Specifically the complaints allege the following:

1. You have made harassing statements in class and in classroom buildings to other students and/or faculty that are intimidating, hostile, and demeaning on the basis of sexual orientation. Specifically ____ complains that you have stated repeatedly that homosexuality is an illness that needs to be "cured".

2. You have made several anti-gay comments to other students, specifically to ____ stating that homosexuality is abnormal and unnatural.

Although the Policy required identification of the complainants, these names were withheld from the Court to protect their privacy.

[14] Only a single complaint involving allegedly harassing remarks made in the context of a classroom discussion was dismissed because of First Amendment concerns. A complaint of anti-semitic harassment was filed on March 27, 1989, by a Jewish student in a class on the Holocaust who was offended by another student's suggestion that Jews cynically used the Holocaust to justify Israel's policies toward the Palestinians. Complaint No. 89-3-2. Accordingly to the Administrator's notes, the perpetrator refused to apologize for the comment. The Administrator phoned the complainant and informed her that the comment was protected speech, not covered by the policy.

[15] The Court's finding that the University interpreted the Policy to reach constitutionally protected speech makes it unnecessary to consider whether the Policy was susceptible to a saving construction. *See Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 493-503, 105 S.Ct. 2794, 2796-2801, 86 L.Ed.2d 394 (1985).

[16] The Statement was redrafted by the University's Civil Liberties Board in 1988. The new Statement, substantially identical to the old, was formally re-enacted by the Regents at their July 1988 meeting.

[*] The Opinion was signed and filed around noon on September 22, 1989. The August 1989 issue of the Law Review, while delivered by mail to chambers that morning, was not first read by the Court until that evening. An earlier awareness of Professor Matsuda's paper certainly would have sharpened the Court's view of the issues.

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Syllabus

# ERZNOZNIK *v.* CITY OF JACKSONVILLE

APPEAL FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

No. 73–1942. Argued February 26, 1975—Decided June 23, 1975

A Jacksonville, Fla., ordinance making it a public nuisance and a punishable offense for a drive-in movie theater to exhibit films containing nudity, when the screen is visible from a public street or place, *held* facially invalid as an infringement of First Amendment rights. Pp. 208–217.

(a) The ordinance by discriminating among movies solely on the basis of content has the effect of deterring drive-in theaters from showing movies containing any nudity, however innocent or even educational, and such censorship of the content of otherwise protected speech cannot be justified on the basis of the limited privacy interest of persons on the public streets, who if offended by viewing the movies can readily avert their eyes. Pp. 208–212.

(b) Nor can the ordinance be justified as an exercise of the city's police power for the protection of children against viewing the films. Even assuming that such is its purpose, the restriction is broader than permissible since it is not directed against sexually explicit nudity or otherwise limited. Pp. 212–214.

(c) Nor can the ordinance be justified as a traffic regulation. If this were its purpose, it would be invalid as a strikingly underinclusive legislative classification since it singles out movies containing nudity from all other movies that might distract a passing motorist. Pp. 214–215.

(d) The possibility of a narrowing construction of the ordinance appears remote, particularly where appellee city offered several distinct justifications for it in its broadest terms. Moreover, its deterrent effect on legitimate expression in the form of movies is both real and substantial. Pp. 215–217.

288 So. 2d 260, reversed.

POWELL, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, STEWART, MARSHALL, and BLACKMUN, JJ., joined. DOUGLAS, J., filed a concurring opinion, *post*, p. 218. BURGER, C. J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 218. WHITE, J., filed a dissenting opinion, *post*, p. 224.

*William H. Maness* argued the cause and filed a brief for appellant.

*William Lee Allen* argued the cause for appellee. With him on the brief was *Harry Louis Shorstein.**

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents a challenge to the facial validity of a Jacksonville, Fla., ordinance that prohibits showing films containing nudity by a drive-in movie theater when its screen is visible from a public street or place.

I

Appellant, Richard Erznoznik, is the manager of the University Drive-In Theatre in Jacksonville. On March 13, 1972, he was charged with violating § 330.313 of the municipal code for exhibiting a motion picture, visible from public streets, in which "female buttocks and bare breasts were shown." [1] The ordinance, adopted January 14, 1972, provides:

> "330.313 *Drive-In Theaters, Films Visible From Public Streets or Public Places.* It shall be unlawful and it is hereby declared a public nuisance for any ticket seller, ticket taker, usher, motion picture projection machine operator, manager, owner, or any

*Briefs of *amici curiae* urging reversal were filed by *James Bouras* for the Motion Picture Association of America, Inc., and by *Irwin Karp* for the Authors League of America, Inc.

[1] The movie, "Class of '74," had been rated "R" by the Motion Picture Association of America. An "R" rating indicates that youths may be admitted only when accompanied by a parent or guardian. See generally Friedman, The Motion Picture Rating System of 1968: A Constitutional Analysis of Self-Regulation by the Film Industry, 73 Col. L. Rev. 185 (1973). Although there is nothing in the record regarding the content of the movie, the parties agree that it includes pictures of uncovered female breasts and buttocks.

other person connected with or employed by any drive-in theater in the City to exhibit, or aid or assist in exhibiting, any motion picture, slide, or other exhibit in which the human male or female bare buttocks, human female bare breasts, or human bare pubic areas are shown, if such motion picture, slide, or other exhibit is visible from any public street or public place. Violation of this section shall be punishable as a Class C offense."

Appellant, with the consent of the city prosecutor, successfully moved to stay his prosecution so that the validity of the ordinance could be tested in a separate declaratory action. In that action appellee, the city of Jacksonville, introduced evidence showing that the screen of appellant's theater is visible from two adjacent public streets and a nearby church parking lot. There was also testimony indicating that people had been observed watching films while sitting outside the theater in parked cars and in the grass.

The trial court upheld the ordinance as a legitimate exercise of the municipality's police power, and ruled that it did not infringe upon appellant's First Amendment rights. The District Court of Appeal, First District of Florida, affirmed, 288 So. 2d 260 (1974), relying exclusively on *Chemline, Inc.* v. *City of Grand Prairie,* 364 F. 2d 721 (CA5 1966), which had sustained a similar ordinance.[2] The Florida Supreme Court denied certiorari, three judges dissenting. 294 So. 2d 93 (1974). We noted probable jurisdiction,[3] 419 U. S. 822 (1974), and now reverse.

[2] The only other United States Court of Appeals to consider this question reached a contrary result. See *Cinecom Theaters Midwest States, Inc.* v. *City of Fort Wayne,* 473 F. 2d 1297 (CA7 1973).

[3] A local ordinance is deemed a state statute for purposes of invoking this Court's jurisdiction under 28 U. S. C. § 1257 (2). See *King Mfg. Co.* v. *City Council of Augusta,* 277 U. S. 100 (1928).

## II

Appellee concedes that its ordinance sweeps far beyond the permissible restraints on obscenity, see *Miller* v. *California*, 413 U. S. 15 (1973), and thus applies to films that are protected by the First Amendment. See *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495 (1952); *Jenkins* v. *Georgia*, 418 U. S. 153 (1974). Nevertheless, it maintains that any movie containing nudity which is visible from a public place may be suppressed as a nuisance. Several theories are advanced to justify this contention.

### A

Appellee's primary argument is that it may protect its citizens against unwilling exposure to materials that may be offensive. Jacksonville's ordinance, however, does not protect citizens from all movies that might offend; rather it singles out films containing nudity, presumably because the lawmakers considered them especially offensive to passersby.

This Court has considered analogous issues—pitting the First Amendment rights of speakers against the privacy rights of those who may be unwilling viewers or auditors—in a variety of contexts. See, *e. g.*, *Kovacs* v. *Cooper*, 336 U. S. 77 (1949); *Breard* v. *Alexandria*, 341 U. S. 622, 641–645 (1951); *Cohen* v. *California*, 403 U. S. 15 (1971); *Lehman* v. *City of Shaker Heights*, 418 U. S. 298 (1974). See generally Haiman, Speech v. Privacy: Is There A Right Not To Be Spoken To?, 67 Nw. U. L. Rev. 153 (1972). Such cases demand delicate balancing because:

> "In th[e] sphere of collision between claims of privacy and those of [free speech or] free press, the interests on both sides are plainly rooted in the traditions and significant concerns of our society."

*Cox Broadcasting Corp.* v. *Cohn,* 420 U. S. 469, 491 (1975).

Although each case ultimately must depend on its own specific facts, some general principles have emerged. A State or municipality may protect individual privacy by enacting reasonable time, place, and manner regulations applicable to all speech irrespective of content. See *Kovacs* v. *Cooper, supra; Cox* v. *Louisiana,* 379 U. S. 536, 554 (1965); *Adderley* v. *Florida,* 385 U. S. 39 (1966). But when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power. See, *e. g., Police Dept. of Chicago* v. *Mosley,* 408 U. S. 92 (1972); *Fowler* v. *Rhode Island,* 345 U. S. 67 (1953); *Kovacs* v. *Cooper, supra,* at 97 (Jackson, J., concurring). Such selective restrictions have been upheld only when the speaker intrudes on the privacy of the home, see *Rowan* v. *Post Office Dept.,* 397 U. S. 728 (1970),[4] or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure. See *Lehman* v. *City of Shaker Heights, supra.*[5] As Mr. Justice Harlan cautioned:

"The ability of government, consonant with the

[4] *Rowan* involved a federal statute that permits a person receiving a "pandering advertisement" which he believes to be "erotically arousing or sexually provocative" to instruct the Postmaster General to inform the sender that such mail is not to be sent in the future. The Court upheld the statute, emphasizing that individual privacy is entitled to greater protection in the home than on the streets and noting that "the right of every person 'to be let alone' must be placed in the scales with the right of others to communicate." See 397 U. S., at 736–738.

[5] In *Lehman* the Court sustained a municipality's policy of barring political advertisements while permitting nonpolitical advertisements

> Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections." *Cohen* v. *California,* 403 U. S., at 21.

The plain, if at times disquieting, truth is that in our pluralistic society, constantly proliferating new and ingenious forms of expression, "we are inescapably captive audiences for many purposes." *Rowan* v. *Post Office Dept., supra,* at 736. Much that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, absent the narrow circumstances described above,[6] the burden

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on city buses. The issue was whether the city had created a "public forum" and thereby obligated itself to accept all advertising. While concluding that no public forum had been established, both the plurality and concurring opinions recognized that the degree of captivity and the resultant intrusion on privacy is significantly greater for a passenger on a bus than for a person on the street. See 418 U. S. 298, 302–304 (opinion of BLACKMUN, J.), and *id.,* at 306–308 (DOUGLAS, J., concurring). See also *Public Utilities Comm'n* v. *Pollak,* 343 U. S. 451, 467 (1952) (DOUGLAS, J., dissenting).

[6] It has also been suggested that government may proscribe, by a properly framed law, "the willful use of scurrilous language calculated to offend the sensibilities of an unwilling audience." *Rosenfeld* v. *New Jersey,* 408 U. S. 901, 905 (1972) (POWELL, J., dissenting). Cf. *Ginzburg* v. *United States,* 383 U. S. 463 (1966). In such cases the speaker may seek to "force public confrontation with the potentially offensive aspects of the work." *Id.,* at 470. It may not be the content of the speech, as much as the deliberate "verbal [or visual] assault," *Rosenfeld, supra,* at 906, that justifies

normally falls upon the viewer to "avoid further bombardment of [his] sensibilities simply by averting [his] eyes." *Cohen* v. *California, supra,* at 21. See also *Spence* v. *Washington,* 418 U. S. 405, 412 (1974).

The Jacksonville ordinance discriminates among movies solely on the basis of content.[7] Its effect is to deter drive-in theaters from showing movies containing any nudity, however innocent or even educational.[8] This

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proscription. See *Redrup* v. *New York,* 386 U. S. 767, 769 (1967). In the present case, however, appellant is not trying to reach, much less shock, unwilling viewers. Appellant manages a commercial enterprise which depends for its success on *paying* customers, not on free-loading passersby. Presumably, where economically feasible, the screen of a drive-in theater will be shielded from those who do not pay.

[7] Scenes of nudity in a movie, like pictures of nude persons in a book, must be considered as a part of the whole work. See *Miller* v. *California,* 413 U. S. 15, 24 (1973); *Kois* v. *Wisconsin,* 408 U. S. 229 (1972). In this respect such nudity is distinguishable from the kind of public nudity traditionally subject to indecent-exposure laws. See *Roth* v. *United States,* 354 U. S. 476, 512 (1957) (DOUGLAS, J., dissenting) ("No one would suggest that the First Amendment permits nudity in public places"). Cf. *United States* v. *O'Brien,* 391 U. S. 367 (1968).

THE CHIEF JUSTICE's dissent, in response to this point, states that "[u]nlike persons reading books, passersby cannot consider fragments of drive-in movies as a part of the 'whole work' for the simple reason that they *see* but do not *hear* the performance . . . ." *Post,* at 222 (emphasis in original). At issue here, however, is not the viewing rights of unwilling viewers but rather the rights of those who operate drive-in theaters and the public that attends these establishments. The effect of the Jacksonville ordinance is to increase the cost of showing films containing nudity. See n. 8, *infra.* In certain circumstances theaters will avoid showing these movies rather than incur the additional costs. As a result persons who want to see such films at drive-ins will be unable to do so. It is in this regard that a motion picture must be considered as a whole, and not as isolated fragments or scenes of nudity.

[8] Such a deterrent, although it might not result in total suppression of these movies, is a restraint on free expression. See *Speiser*

discrimination cannot be justified as a means of preventing significant intrusions on privacy. The ordinance seeks only to keep these films from being seen from public streets and places where the offended viewer readily can avert his eyes. In short, the screen of a drive-in theater is not "so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it." *Redrup* v. *New York,* 386 U. S. 767, 769 (1967). Thus, we conclude that the limited privacy interest of persons on the public streets cannot justify this censorship of otherwise protected speech on the basis of its content.[9]

B

Appellee also attempts to support the ordinance as an exercise of the city's undoubted police power to protect children. Appellee maintains that even though it cannot prohibit the display of films containing nudity to adults, the present ordinance is a reasonable means of protecting minors from this type of visual influence.

It is well settled that a State or municipality can adopt more stringent controls on communicative materials available to youths than on those available to adults. See, *e. g., Ginsberg* v. *New York,* 390 U. S. 629 (1968). Nevertheless, minors are entitled to a significant measure of First Amendment protection, see *Tinker*

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v. *Randall,* 357 U. S. 513, 518–519 (1958). The record does not indicate how much it would cost to block public view of appellant's theater. Such costs generally will vary with circumstances. In one case the expense was estimated at approximately a quarter million dollars. See *Olympic Drive-In Theatre, Inc.* v. *City of Pagedale,* 441 S. W. 2d 5, 8 (Mo. 1969).

[9] We are not concerned in this case with a properly drawn zoning ordinance restricting the location of drive-in theaters or with a nondiscriminatory nuisance ordinance designed to protect the privacy of persons in their homes from the visual and audible intrusions of such theaters.

v. *Des Moines School Dist.*, 393 U. S. 503 (1969), and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them. See, *e. g., Interstate Circuit, Inc.* v. *City of Dallas*, 390 U. S. 676, 1968); *Rabeck* v. *New York*, 391 U. S. 462 (1968).

In this case, assuming the ordinance is aimed at prohibiting youths from viewing the films, the restriction is broader than permissible. The ordinance is not directed against sexually explicit nudity, nor is it otherwise limited. Rather, it sweepingly forbids display of all films containing *any* uncovered buttocks or breasts, irrespective of context or pervasiveness. Thus it would bar a film containing a picture of a baby's buttocks, the nude body of a war victim, or scenes from a culture in which nudity is indigenous. The ordinance also might prohibit newsreel scenes of the opening of an art exhibit as well as shots of bathers on a beach. Clearly all nudity cannot be deemed obscene even as to minors. See *Ginsberg* v. *New York, supra.*[10] Nor can such a broad restriction be justified by any other governmental interest pertaining to minors. Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks un-

[10] In *Ginsberg* the Court adopted a variation of the adult obscenity standards enunciated in *Roth* v. *United States*, 354 U. S. 476 (1957), and *Memoirs* v. *Massachusetts*, 383 U. S. 413 (1966) (plurality opinion). In *Miller* v. *California, supra*, we abandoned the *Roth-Memoirs* test for judging obscenity with respect to adults. We have not had occasion to decide what effect *Miller* will have on the *Ginsberg* formulation. It is clear, however, that under any test of obscenity as to minors not all nudity would be proscribed. Rather, to be obscene "such expression must be, in some significant way, erotic." *Cohen* v. *California*, 403 U. S. 15, 20 (1971). See *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 106–107 (1973) (BRENNAN, J., dissenting).

suitable for them. In most circumstances,[11] the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors. See *Tinker* v. *Des Moines School Dist., supra.* Cf. *West Virginia Bd. of Ed.* v. *Barnette,* 319 U. S. 624 (1943). Thus, if Jacksonville's ordinance is intended to regulate expression accessible to minors it is overbroad in its proscription.[12]

C

At oral argument appellee, for the first time, sought to justify its ordinance as a traffic regulation. It claimed that nudity on a drive-in movie screen distracts passing motorists, thus slowing the flow of traffic and increasing the likelihood of accidents.

Nothing in the record or in the text of the ordinance suggests that it is aimed at traffic regulation. Indeed, the ordinance applies to movie screens visible from public places as well as public streets, thus indicating that it is not a traffic regulation. But even if this were the purpose of the ordinance, it nonetheless would be invalid. By singling out movies containing even the most fleeting and innocent glimpses of nudity the legislative classification is strikingly underinclusive. There is no reason to think that a wide variety of other scenes in the custom-

[11] The First Amendment rights of minors are not "co-extensive with those of adults." *Tinker* v. *Des Moines School Dist.,* 393 U. S. 503, 515 (1969) (STEWART, J., concurring). "[A] State may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." *Ginsberg* v. *New York,* 390 U. S. 629, 649–650 (1968) (STEWART, J., concurring). In assessing whether a minor has the requisite capacity for individual choice the age of the minor is a significant factor. See *Rowan* v. *Post Office Dept.,* 397 U. S., at 741 (BRENNAN, J., concurring).

[12] See Part III, *infra.*

ary screen diet, ranging from soap opera to violence, would be any less distracting to the passing motorist.

This Court frequently has upheld underinclusive classifications on the sound theory that a legislature may deal with one part of a problem without addressing all of it. See, *e. g.*, *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 488–489 (1955). This presumption of statutory validity, however, has less force when a classification turns on the subject matter of expression. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago* v. *Mosley*, 408 U. S., at 95. Thus, "under the Equal Protection Clause, not to mention the First Amendment itself," *id.*, at 96, even a traffic regulation cannot discriminate on the basis of content unless there are clear reasons for the distinctions. See also *Cox* v. *Louisiana*, 379 U. S. 559, 581 (1965) (opinion of Black, J.). Cf. *Williams* v. *Rhodes*, 393 U. S. 23 (1968); *Shapiro* v. *Thompson*, 394 U. S. 618 (1969).

Appellee offers no justification, nor are we aware of any, for distinguishing movies containing nudity from all other movies in a regulation designed to protect traffic. Absent such a justification, the ordinance cannot be salvaged by this rationale.[13]

## III

Even though none of the reasons advanced by appellee will sustain the Jacksonville ordinance, it remains for us to decide whether the ordinance should be invalidated on

[13] This is not to say that a narrowly drawn nondiscriminatory traffic regulation requiring screening of drive-in movie theaters from the view of motorists would not be a reasonable exercise of police power. See *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 98 (1972), and cases cited.

its face. This Court has long recognized that a demonstrably overbroad statute or ordinance may deter the legitimate exercise of First Amendment rights. Nonetheless, when considering a facial challenge it is necessary to proceed with caution and restraint, as invalidation may result in unnecessary interference with a state regulatory program. In accommodating these competing interests the Court has held that a state statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction by the state courts, see *Dombrowski* v. *Pfister,* 380 U. S. 479, 497 (1965), and its deterrent effect on legitimate expression is both real and substantial. See *Broadrick* v. *Oklahoma,* 413 U. S. 601, 612–615 (1973). See generally Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844 (1970).

In the present case the possibility of a limiting construction appears remote. Appellee explicitly joined in this test of the facial validity of its ordinance by agreeing to stay appellant's prosecution.[14] Moreover, the ordinance by its plain terms is not easily susceptible of a narrowing construction.[15] Indeed, when the state courts were presented with this overbreadth challenge they made no effort to restrict its application. Compare *Coates* v. *City of Cincinnati,* 402 U. S. 611, 612–613

[14] In this respect the present case arises in a posture that differs from most challenges to a statute or ordinance considered by this Court. Typically in such cases the issue arises in a context where the statute or ordinance has been applied to allegedly unprotected activity. Thus, we are able to consider the constitutionality of the statute "as applied" as well as "on its face."

[15] The only narrowing construction which occurs to us would be to limit the ordinance to movies that are obscene as to minors. Neither appellee nor the Florida courts have suggested such a limitation, perhaps because a rewriting of the ordinance would be necessary to reach that result.

(1971), and *Brandenburg* v. *Ohio,* 395 U. S. 444, 448–449 (1969), with *Cox* v. *New Hampshire,* 312 U. S. 569, 575–576 (1941), and *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 572–573 (1942). In these circumstances, particularly where as here appellee offers several distinct justifications for the ordinance in its broadest terms, there is no reason to assume that the ordinance can or will be decisively narrowed. See *Gooding* v. *Wilson,* 405 U. S. 518, 520–527 (1972). Cf. *Grayned* v. *City of Rockford,* 408 U. S. 104, 111–112 (1972); *Time, Inc.* v. *Hill,* 385 U. S. 374, 397 (1967).

Moreover, the deterrent effect of this ordinance is both real and substantial. Since it applies specifically to all persons employed by or connected with drive-in theaters, the owners and operators of these theaters are faced with an unwelcome choice: to avoid prosecution of themselves and their employees they must either restrict their movie offerings or construct adequate protective fencing which may be extremely expensive or even physically impracticable.[16] Cf. *Lake Carriers' Assn.* v. *MacMullan,* 406 U. S. 498, 513 (1972) (POWELL, J., dissenting).

## IV

In concluding that this ordinance is invalid we do not deprecate the legitimate interests asserted by the city of Jacksonville. We hold only that the present ordinance does not satisfy the rigorous constitutional standards that apply when government attempts to regulate expression. Where First Amendment freedoms are at stake we have repeatedly emphasized that precision of drafting and clarity

[16] In this case appellant himself is a theater manager. Hence the statute's deterrent effect acts upon him personally; he is not seeking to raise the hypothetical rights of others. See *Breard* v. *Alexandria,* 341 U. S. 622, 641 (1951).

of purpose are essential. These prerequisites are absent here. Accordingly the judgment below is

*Reversed.*

MR. JUSTICE DOUGLAS, concurring.

I join wholeheartedly in the Court's view that the ordinance in issue here is fatally overinclusive in some respects and fatally underinclusive in others. I do not doubt that under proper circumstances, a narrowly drawn ordinance could be utilized within constitutional boundaries to protect the interests of captive audiences [1] or to promote highway safety. In these days of heavy traffic, it is reasonable to attempt to remove all distractions that might increase accidents. These legitimate interests cannot, however, justify attempts to discriminate among movies on the basis of their content—a "pure" movie is apt to be just as distracting to drivers as an "impure" one, and to be just as intrusive upon the privacy of an unwilling but captive audience. Any ordinance which regulates movies on the basis of content, whether by an obscenity standard [2] or by some other criterion, impermissibly intrudes upon the free speech rights guaranteed by the First and Fourteenth Amendments.

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE REHNQUIST joins, dissenting.

Although the Court pays lip service to the proposition that "each case ultimately must depend on its own spe-

[1] See *Lehman* v. *City of Shaker Heights,* 418 U. S. 298, 305 (1974) (DOUGLAS, J., concurring in judgment); *Public Utilities Comm'n* v. *Pollak,* 343 U. S. 451, 467 (1952) (DOUGLAS, J., dissenting).

[2] I adhere to my view that any state or federal regulation of obscenity is prohibited by the Constitution. *Roth* v. *United States,* 354 U. S. 476, 508–514 (1957) (dissenting); *Miller* v. *California,* 413 U. S. 15, 42–47 (1973) (dissenting); *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 70–73 (1973) (dissenting).

cific facts," *ante,* at 209, it strikes down Jacksonville City Code § 330.313 by a mechanical application of "general principles" distilled from cases having little to do with either this case or each other. Because I can accept neither that approach nor its result, I dissent.

The Court's analysis seems to begin and end with the sweeping proposition that, regardless of the circumstances, government may not regulate any form of "communicative" activity on the basis of its content. Absent certain "special circumstances," we are told, the burden falls upon the public to ignore offensive materials rather than upon their purveyor to take steps to shield them from public view. In four short sentences without reasoned support, *ante,* at 211–212, the Court concludes that Jacksonville's ordinance does not pass muster under its tests, and therefore strikes it down.

None of the cases upon which the Court relies remotely implies that the Court ever intended to establish inexorable limitations upon state power in this area. Many cases upheld the regulation of communicative activity and did not purport to define the limits of the power to do so. *E. g., Lehman* v. *City of Shaker Heights,* 418 U. S. 298 (1974); *Rowan* v. *Post Office Dept.,* 397 U. S. 728 (1970); *Breard* v. *Alexandria,* 341 U. S. 622 (1951); *Kovacs* v. *Cooper,* 336 U. S. 77 (1949). Other cases relied upon by the Court were either expressly or impliedly decided upon equal protection grounds and, although recognizing that First Amendment interests were involved, turned upon "the crucial question . . . whether there is an appropriate governmental interest suitably furthered by the differential treatment." *Police Dept. of Chicago* v. *Mosley,* 408 U. S. 92, 95 (1972). See also *Fowler* v. *Rhode Island,* 345 U. S. 67 (1953). Such a standard necessarily requires particularized review. Finally, yet other of the cases cited by the Court were

decided on vagueness and overbreadth. *E. g., Cox* v. *Louisiana,* 379 U. S. 536 (1965). Again, application of these doctrines requires scrutiny of the specific statute and activity involved rather than reliance upon generalizations. See, *e. g., id.,* at 544–558.

In short, nothing in this Court's prior decisions justifies disregard of the admonition that "the nature of the forum and the conflicting interests involved have remained important in determining the degree of protection afforded by the [First] Amendment to the speech in question." *Lehman* v. *City of Shaker Heights, supra,* at 302–303 (plurality opinion of BLACKMUN, J.). Rather, in applying this principle in contexts similar to the instant case, members of this Court have cautioned that every medium of communication "is a law unto itself," *Kovacs* v. *Cooper, supra,* at 97 (Jackson, J., concurring), and that the "tyranny of absolutes" should not be relied upon "to meet the problems generated by the need to accommodate the diverse interests affected by the motion pictures in compact modern communities." *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495, 518 (1952) (Frankfurter, J., concurring).

A careful consideration of the diverse interests involved in this case illustrates, for me, the inadequacy of the Court's rigidly simplistic approach. In the first place, the conclusion that only a limited interest of persons on the public streets is at stake here can be supported only if one completely ignores the unique visual medium to which the Jacksonville ordinance is directed. Whatever validity the notion that passersby may protect their sensibilities by averting their eyes may have when applied to words printed on an individual's jacket, see *Cohen* v. *California,* 403 U. S. 15 (1971), or a flag hung from a second-floor apartment window, see *Spence* v. *Washington,* 418 U. S. 405 (1974), it distorts reality to

apply that notion to the outsize screen of a drive-in movie theater. Such screens are invariably huge; [1] indeed, photographs included in the record of this case show that the screen of petitioner's theater dominated the view from public places including nearby residences and adjacent highways. Moreover, when films are projected on such screens the combination of color and animation against a necessarily dark background is designed to, and results in, attracting and holding the attention of all observers. See Note, Motion Pictures and the First Amendment, 60 Yale L. J. 696, 707–708 (1951). Similar considerations led Mr. Justice Brandeis, writing for the Court in *Packer Corp.* v. *Utah,* 285 U. S. 105 (1932), to conclude that there is a public interest in regulating billboard displays which may not apply to other forms of advertising:

> "'Advertisements of this sort are constantly before the eyes of observers on the streets and in street cars to be seen without the exercise of choice or volition on their part. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. The young people as well as the adults have the message of the billboard thrust upon them by all the arts and devices that skill can produce. In the case of newspapers and magazines, there must be some seeking by the one who is to see and read the advertisement. The radio can be turned off, but not so the billboard or street car placard. These distinctions clearly place this kind of advertisment in a position to be classified so that regulations or prohibitions may be imposed upon all within the class.'" *Id.,* at 110.

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[1] For example, in a case similar to this one the screen measured 35 feet by 70 feet and stood 54 feet above the ground. *Bloss* v. *Paris Township,* 380 Mich. 466, 157 N. W. 2d 260 (1968).

So here, the screen of a drive-in movie theater is a unique type of eye-catching display that can be highly intrusive and distracting. Public authorities have a legitimate interest in regulating such displays under the police power; for example, even though traffic safety may not have been the only target of the ordinance in issue here, I think it not unreasonable for lawmakers to believe that public nudity on a giant screen, visible at night to hundreds of drivers of automobiles, may have a tendency to divert attention from their task and cause accidents.

No more defensible is the Court's conclusion that Jacksonville's ordinance is defective because it regulates only nudity. The significance of this fact is explained only in a footnote:

> "Scenes of nudity in a movie, like pictures of nude persons in a book, must be considered as a part of the whole work. . . . In this respect such nudity is distinguishable from the kind of public nudity traditionally subject to indecent-exposure laws." *Ante,* at 211 n. 7.

Both the analogy and the distinction are flawed. Unlike persons reading books, passersby cannot consider fragments of drive-in movies as a part of the "whole work" for the simple reason that they *see* but do not *hear* the performance, cf. Note, *supra,* 60 Yale L. J., at 707, and n. 27; nor do drivers and passengers on nearby highways see the whole of the visual display. The communicative value of such fleeting exposure falls somewhere in the range of slight to nonexistent. Moreover, those persons who legitimately desire to consider the "work as a whole" are not foreclosed from doing so. The record shows that the film from which appellant's prosecution arose was exhibited in several indoor theaters in the Jacksonville area. And the owner of a drive-in movie theater is not prevented from exhibiting nonobscene films involving

nudity so long as he effectively shields the screen from public view. Thus, regardless of whether the ordinance involved here can be loosely described as regulating the content of a certain type of display, it is not a restriction of any "message." Cf. *Police Dept. of Chicago* v. *Mosley, supra,* at 95–96; *Grayned* v. *City of Rockford,* 408 U. S. 104, 115 (1972). The First Amendment interests involved in this case are trivial at best.

On the other hand, assuming *arguendo* that there could be a play performed in a theater by nude actors involving genuine communication of ideas, the same conduct in a public park or street could be prosecuted under an ordinance prohibiting indecent exposure. This is so because the police power has long been interpreted to authorize the regulation of nudity in areas to which all members of the public have access, regardless of any incidental effect upon communication. A nudist colony, for example, cannot lawfully set up shop in Central Park or Lafayette Park, places established for the public generally. Cf. *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 67 (1973); *Roth* v. *United States,* 354 U. S. 476, 512 (1957) (DOUGLAS, J., dissenting). Whether such regulation is justified as necessary to protect public mores or simply to insure the undistracted enjoyment of open areas by the greatest number of people—or for traffic safety—its rationale applies *a fortiori* to giant displays which through technology are capable of revealing and emphasizing the most intimate details of human anatomy.

In sum, the Jacksonville ordinance involved in this case, although no model of draftsmanship, is narrowly drawn to regulate only certain unique public exhibitions of nudity; it would be absurd to suggest that it operates to suppress expression of *ideas.* By conveniently ignoring these facts and deciding the case on the basis of

absolutes the Court adds nothing to First Amendment analysis and sacrifices legitimate state interests. I would affirm the judgment of the Florida Court of Appeal.[2]

MR. JUSTICE WHITE, dissenting.

The Court asserts that the State may shield the public from selected types of speech and allegedly expressive conduct, such as nudity, only when the speaker or actor invades the privacy of the home or where the degree of captivity of an unwilling listener is such that it is impractical for him to avoid the exposure by averting his eyes. The Court concludes "that the limited privacy interest of persons on the public streets cannot justify this censorship of otherwise protected speech on the basis of its content." *Ante,* at 212. If this broadside is to be taken literally, the State may not forbid "expressive" nudity on the public streets, in the public parks, or any other public place since other persons in those places at that time have a "limited privacy interest" and may merely look the other way.

I am not ready to take this step with the Court. Moreover, by the Court's own analysis, the step is an unnecessary one. If, as the Court holds in Part II–B of its opinion, the ordinance is unconstitutionally overbroad even as an exercise of the police power to protect children, it is fatally overbroad as to the population generally. Part II–A is surplusage. I therefore dissent.

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[2] On my view of this case it is not necessary to deal with the issues discussed in Parts II–B, II–C, and III of the Court's opinion.

Syllabus

# HEALY ET AL. v. JAMES ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 71-452. Argued March 28, 1972—Decided June 26, 1972

Petitioners, seeking to form a local chapter of Students for a Democratic Society (SDS) at a state-supported college, were denied recognition as a campus organization. Recognition would have entitled petitioners to use campus facilities for meetings and to use of the campus bulletin board and school newspaper. The college president denied recognition because he was not satisfied that petitioners' group was independent of the National SDS, which he concluded has a philosophy of disruption and violence in conflict with the college's declaration of student rights. Petitioners thereupon brought this action for declaratory and injunctive relief. The District Court first ordered a further administrative hearing, after which the president reaffirmed his prior decision. Approving the president's judgment, the District Court held that petitioners had failed to show that they could function free from the National SDS and that the college's refusal to approve the group, which the court found "likely to cause violent acts of disruption," did not violate petitioners' associational rights. The Court of Appeals, purporting not to reach the First Amendment issues, affirmed on the ground that petitioners had failed to avail themselves of the due process accorded to them and to meet their burden of complying with the prevailing standards for recognition. *Held:*

1. The courts erred in (1) discounting the cognizable First Amendment associational interest that petitioners had in furthering their personal beliefs and (2) assuming that the burden was on petitioners to show entitlement to recognition by the college rather than on the college to justify its nonrecognition of the group, once petitioners had made application conformably to college requirements. Pp. 180–185.

2. Insofar as the denial of recognition to petitioners' group was based on an assumed relationship with the National SDS, or was a result of disagreement with the group's philosophy, or was a consequence of a fear of disruption, for which there was no support in the record, the college's decision violated the petitioners' First Amendment rights. A proper basis for nonrecognition might have

been afforded, however, by a showing that the group refused to comply with a rule requiring them to abide by reasonable campus regulations. Since the record is not clear whether the college has such a rule and, if so, whether petitioners intend to observe it, these issues remain to be resolved. Pp. 185–194.

445 F. 2d 1122, reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, BRENNAN, STEWART, WHITE, MARSHALL, and BLACKMUN, JJ., joined. BURGER, C. J., filed a concurring opinion, *post*, p. 195. DOUGLAS, J., filed a separate opinion, *post*, p. 196. REHNQUIST, J., filed a statement concurring in the result, *post*, p. 201.

*Melvin L. Wulf* argued the cause for petitioners. With him on the brief were *Eugene Z. DuBose, Jr.*, *Alvin Pudlin*, and *Sanford Jay Rosen*.

*F. Michael Ahern*, Assistant Attorney General of Connecticut, argued the cause for respondents. With him on the brief was *Robert K. Killian*, Attorney General.

Briefs of *amici curiae* urging affirmance were filed by *Evelle J. Younger*, Attorney General of California, and *Donald B. Day*, Deputy Attorney General, for the Board of Trustees of California State Colleges; by *Frank G. Carrington, Jr.*, and *Alan S. Ganz* for Americans for Effective Law Enforcement, Inc.; and by *Morris I. Leibman* and *Philip B. Kurland* for the American Association of Presidents of Independent Colleges and Universities.

MR. JUSTICE POWELL delivered the opinion of the Court.

This case, arising out of a denial by a state college of official recognition to a group of students who desired to form a local chapter of Students for a Democratic Society (SDS), presents this Court with questions requiring the application of well-established First Amendment principles. While the factual background of this

particular case raises these constitutional issues in a manner not heretofore passed on by the Court, and only infrequently presented to lower federal courts, our decision today is governed by existing precedent.

As the case involves delicate issues concerning the academic community, we approach our task with special caution, recognizing the mutual interest of students, faculty members, and administrators in an environment free from disruptive interference with the educational process. We also are mindful of the equally significant interest in the widest latitude for free expression and debate consonant with the maintenance of order. Where these interests appear to compete the First Amendment, made binding on the States by the Fourteenth Amendment, strikes the required balance.

## I

We mention briefly at the outset the setting in 1969–1970. A climate of unrest prevailed on many college campuses in this country. There had been widespread civil disobedience on some campuses, accompanied by the seizure of buildings, vandalism, and arson. Some colleges had been shut down altogether, while at others files were looted and manuscripts destroyed. SDS chapters on some of those campuses had been a catalytic force during this period.[1] Although the causes of campus disruption were many and complex, one of the prime consequences of such activities was the denial of the lawful exercise of First Amendment rights to the majority of students by the few. Indeed, many of the most cherished characteristics long associated with institutions of higher learning appeared to be endangered. For-

[1] See Report of the President's Commission on Campus Unrest (1970); Report of the American Bar Association Commission on Campus Government and Student Dissent (1970).

tunately, with the passage of time, a calmer atmosphere and greater maturity now pervade our campuses. Yet, it was in this climate of earlier unrest that this case arose.

Petitioners are students attending Central Connecticut State College (CCSC), a state-supported institution of higher learning. In September 1969 they undertook to organize what they then referred to as a "local chapter" of SDS. Pursuant to procedures established by the College, petitioners filed a request for official recognition as a campus organization with the Student Affairs Committee, a committee composed of four students, three faculty members, and the Dean of Student Affairs. The request specified three purposes for the proposed organization's existence. It would provide "a forum of discussion and self-education for students developing an analysis of American society"; it would serve as "an agency for integrating thought with action so as to bring about constructive changes"; and it would endeavor to provide "a coordinating body for relating the problems of leftist students" with other interested groups on campus and in the community.[2] The Committee, while satisfied that the statement of purposes was clear and unobjectionable on its face, exhibited concern over the relationship between the proposed local group and the National SDS organization. In response to inquiries, representatives of the proposed organization stated that they would not affiliate with any national organization and that their group would remain "completely independent."

In response to other questions asked by Committee members concerning SDS' reputation for campus disruption, the applicants made the following statements,

[2] The statement of purposes is set out as an Appendix to the Second Circuit's opinion and appears following the dissent thereto. 445 F. 2d 1122, 1135–1139 (1971).

which proved significant during the later stages of these proceedings:

"Q. How would you respond to issues of violence as other S. D. S. chapters have?

"A. Our action would have to be dependent upon each issue.

"Q. Would you use any means possible?

"A. No I can't say that; would not know until we know what the issues are.

. . . . .

"Q. Could you envision the S. D. S. interrupting a class?

"A. Impossible for me to say."

With this information before it, the Committee requested an additional filing by the applicants, including a formal statement regarding affiliations. The amended application filed in response stated flatly that "CCSC Students for a Democratic Society are not under the dictates of any National organization." [3] At a second hearing before the Student Affairs Committee, the question of relationship with the National organization was raised again. One of the organizers explained that the National SDS was divided into several "factional groups," that the national-local relationship was a loose one, and that the local organization accepted only "certain ideas" but not all of the National organization's aims and philosophies.

By a vote of six to two the Committee ultimately approved the application and recommended to the Pres-

[3] 445 F. 2d, at 1133. During the Committee's consideration of petitioners' application, one of the group's representatives was asked why, if it indeed desired to remain independent, it chose to use a nationally known name. The witness' response was that "the name brings to mind the type of organization we wish to bring across, that is, a left-wing organization which will allow students interested in such to express themselves."

ident of the College, Dr. James, that the organization be accorded official recognition. In approving the application, the majority indicated that its decision was premised on the belief that varying viewpoints should be represented on campus and that since the Young Americans for Freedom, the Young Democrats, the Young Republicans, and the Liberal Party all enjoyed recognized status, a group should be available with which "left wing" students might identify. The majority also noted and relied on the organization's claim of independence. Finally, it admonished the organization that immediate suspension would be considered if the group's activities proved incompatible with the school's policies against interference with the privacy of other students or destruction of property. The two dissenting members based their reservation primarily on the lack of clarity regarding the organization's independence.

Several days later, the President rejected the Committee's recommendation, and issued a statement indicating that petitioners' organization was not to be accorded the benefits of official campus recognition. His accompanying remarks, which are set out in full in the margin,[4] indicate several reasons for his action. He

[4] The President stated:

"Though I have full appreciation for the action of the Student Affairs Committee and the reasons stated in their minutes for the majority vote recommending approval of a local chapter of Students for a Democratic Society, it is my judgment that the statement of purpose to form a local chapter of Students for a Democratic Society carries full and unmistakable adherence to at least some of the major tenets of the national organization, loose and divided though that organization may be. The published aims and philosophy of the Students for a Democratic Society, which include disruption and violence, are contrary to the approved policy (by faculty, students, and administration) of Central Connecticut State College which states:

" 'Students do not have the right to invade the privacy of others, to damage the property of others, to disrupt the regular and es-

found that the organization's philosophy was antithetical to the school's policies,[5] and that the group's independence was doubtful. He concluded that approval should

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sential operation of the college, or to interfere with the rights of others.'

"The further statement on the request for recognition that 'CCSC Students for a Democratic Society are not under the dictates of any National organization' in no way clarifies why if a group intends to follow the established policy of the college, they wish to become a local chapter of an organization which openly repudiates such a policy.

"Freedom of speech, academic freedom on the campus, the freedom of establishing an open forum for the exchange of ideas, the freedoms outlined in the Statement on Rights, Freedoms, and Responsibilities of Students that 'college students and student organizations shall have the right to examine and discuss all questions of interest to them, to express opinion publicly and privately, and to support causes by orderly means. They may organize public demonstrations and protest gatherings and utilize the right of petition'—these are all precious freedoms that we cherish and are freedoms on which we stand. To approve any organization or individual who joins with an organization which openly repudiates those principles is contrary to those freedoms and to the approved 'Statement on the Rights, Freedoms, and Responsibilities of Students' at Central." App. 15–16.

[5] In 1969, CCSC adopted, as have many other colleges and universities, a Statement on Rights, Freedoms and Responsibilities of Students. This statement, commonly referred to as the "Student Bill of Rights," is printed as an Appendix to the Second Circuit's majority opinion in this case, 445 F. 2d, at 1135–1139, see n. 2, *supra*. Part V of that statement establishes the standards for approval of campus organizations and imposes several basic limitations on their campus activities:

"A. Care shall be taken in the establishment and organization of campus groups so that the basic rights, freedoms and responsibilities of students will be preserved.

"B. Student organizations shall submit a clear statement of purpose, criteria for membership, rules of procedures and a list of officers as a condition of institutional recognition. They shall not be required to submit a membership list as a condition of institutional recognition.

"C. Membership in campus organizations shall be limited to

not be granted to any group that "openly repudiates" the College's dedication to academic freedom.

Denial of official recognition posed serious problems for the organization's existence and growth. Its members were deprived of the opportunity to place announcements regarding meetings, rallies, or other activities in the student newspaper; they were precluded from using various campus bulletin boards; and—most importantly—nonrecognition barred them from using campus facilities for holding meetings. This latter disability was brought home to petitioners shortly after the President's announcement. Petitioners circulated a notice calling a meeting to discuss what further action should be taken in light of the group's official rejection. The members met at the coffee shop in the Student Center ("Devils' Den") but were disbanded on the President's order since nonrecognized groups were not entitled to use such facilities.[6]

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matriculated students (day or evening) at the college. Membership shall not be restricted by race, religion or nationality. The members shall have sole power to determine organization policy consistent with the regulations of the college.

"D. Each organization is free to choose its own adviser. Advisers to organizations shall advise but not control the organizations and their policies.

"E. College students and student organizations shall have the right to examine and discuss all questions of interest to them, to express opinion publicly and privately, and to support causes by orderly means. They may organize public demonstrations and protest gatherings and utilize the right of petition. Students do not have the right to deprive others of the opportunity to speak or be heard, to invade the privacy of others, to damage the property of others, to disrupt the regular and essential operation of the college, or to interfere with the rights of others."

[6] During the meeting petitioners were approached by two of the College's deans, who served petitioners with a memorandum from the President stating:

"Notice has been received by this office of a meeting of the

Their efforts to gain recognition having proved ultimately unsuccessful, and having been made to feel the burden of nonrecognition, petitioners resorted to the courts. They filed a suit in the United States District Court for the District of Connecticut, seeking declaratory and injunctive relief against the President of the College, other administrators, and the State Board of Trustees. Petitioners' primary complaint centered on the denial of First Amendment rights of expression and association arising from denial of campus recognition. The cause was submitted initially on stipulated facts, and, after a short hearing, the judge ruled that petitioners had been denied procedural due process because the President had based his decision on conclusions regarding the applicant's affiliation which were outside the record before him. The court concluded that if the President wished to act on the basis of material outside the application he must at least provide petitioners a hearing and opportunity to introduce evidence as to their affiliations. 311 F. Supp. 1275, 1279, 1281. While retaining jurisdiction over the case, the District Court ordered respondents to hold a hearing in order to clarify the several ambiguities surrounding the President's decision. One of the matters to be explored was whether the local organization, true to its repeated affirmations, was in fact independent of the National SDS. *Id.*, at 1282. And if the hearing demonstrated that the two were not separable, the respondents were instructed that they might then review the "aims and philosophy" of the National organization. *Ibid.*

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'C. C. S. C.-S. D. S. on Thursday—November 6 at 7:00 p. m. at the Devils' Den.'

"Such meeting may not take place in the Devils' Den of the Student Center nor in or on any other property of the college since the C. C. S. C.-S. D. S. is not a duly recognized college organization.

"You are hereby notified by this action to cease and desist from meeting on college property."

Pursuant to the court's order, the President designated Dean Judd, the Dean of Student Affairs, to serve as hearing officer and a hearing was scheduled. The hearing, which spanned two dates and lasted approximately two hours, added little in terms of objective substantive evidence to the record in this case. Petitioners introduced a statement offering to change the organization's name from "CCSC local chapter of SDS" to "Students for a Democratic Society of Central Connecticut State College." They further reaffirmed that they would "have no connection whatsoever to the structure of an existing national organization." [7] Petitioners also introduced the testimony of their faculty adviser to the effect that some local SDS organizations elsewhere were unaffiliated with any national organization. The hearing officer, in addition to introducing the minutes from the two pertinent Student Affairs Committee meetings, also introduced, *sua sponte,* portions of a transcript of hearings before the United States House of Representatives Internal Security Committee investigating the activities of SDS. Excerpts were offered both to prove that violent and disruptive activities had been attributed to SDS elsewhere and to demonstrate that there existed a national organization that recognized and cooperated with regional and local college campus affiliates. Petitioners did not challenge the asserted existence of a National SDS, nor did they question that it did have a system of affiliations of some

[7] 319 F. Supp. 113, 114 (1970). The hearing officer, over petitioners' objection, ruled that the statement was inadmissible, apparently on the ground that it would constitute an amendment to the original application and would be beyond the permissible scope of the hearing. Whatever the merits of this ruling, the statement was in the record reviewed by the President and was relied on in the subsequent District Court opinion without reference to its prior exclusion. *Ibid.*

sort. Their contention was simply that their organization would not associate with that network. Throughout the hearing the parties were acting at cross purposes. What seemed relevant to one appeared completely immaterial to the other. This failure of the hearing to advance the litigation was, at bottom, the consequence of a more basic failure to join issue on the considerations that should control the President's ultimate decision, a problem to which we will return in the ensuing section.

Upon reviewing the hearing transcript and exhibits, the President reaffirmed his prior decision to deny petitioners recognition as a campus organization. The reasons stated, closely paralleling his initial reasons, were that the group would be a "disruptive influence" at CCSC and that recognition would be "contrary to the orderly process of change" on the campus.

After the President's second statement issued, the case then returned to the District Court, where it was ordered dismissed. The court concluded, first, that the formal requisites of procedural due process had been complied with, second, that petitioners had failed to meet their burden of showing that they could function free from the National organization, and, third, that the College's refusal to place its stamp of approval on an organization whose conduct it found "likely to cause violent acts of disruption" did not violate petitioners' associational rights. 319 F. Supp. 113, 116.

Petitioners appealed to the Court of Appeals for the Second Circuit where, by a two-to-one vote, the District Court's judgment was affirmed. The majority purported not to reach the substantive First Amendment issues on the theory that petitioners had failed to avail themselves of the due process accorded them and had failed to meet their burden of complying with the prevailing standards for recognition. 445 F. 2d 1122, 1131–1132. Judge

Smith dissented, disagreeing with the majority's refusal to address the merits and finding that petitioners had been deprived of basic First Amendment rights. *Id.*, at 1136. This Court granted certiorari and, for the reasons that follow, we conclude that the judgments of the courts below must be reversed and the case remanded for reconsideration.

## II

At the outset we note that state colleges and universities are not enclaves immune from the sweep of the First Amendment. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker* v. *Des Moines Independent School District*, 393 U. S. 503, 506 (1969). Of course, as Mr. Justice Fortas made clear in *Tinker*, First Amendment rights must always be applied "in light of the special characteristics of the . . . environment" in the particular case. *Ibid.* And, where state-operated educational institutions are involved, this Court has long recognized "the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Id.*, at 507. Yet, the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton* v. *Tucker*, 364 U. S. 479, 487 (1960). The college classroom with its surrounding environs is peculiarly the " 'marketplace of ideas,' " and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding aca-

demic freedom. *Keyishian* v. *Board of Regents,* 385 U. S. 589, 603 (1967); *Sweezy* v. *New Hampshire,* 354 U. S. 234, 249–250 (1957) (plurality opinion of Mr. Chief Justice Warren), 262 (Frankfurter, J., concurring in result).

Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition. See, *e. g., Baird* v. *State Bar of Arizona,* 401 U. S. 1, 6 (1971); *NAACP* v. *Button,* 371 U. S. 415, 430 (1963); *Louisiana ex rel. Gremillion* v. *NAACP,* 366 U. S. 293, 296 (1961); *NAACP* v. *Alabama ex rel. Patterson,* 357 U. S. 449 (1958) (Harlan, J., for a unanimous Court). There can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges that associational right. The primary impediment to free association flowing from nonrecognition is the denial of use of campus facilities for meetings and other appropriate purposes. The practical effect of nonrecognition was demonstrated in this case when, several days after the President's decision was announced, petitioners were not allowed to hold a meeting in the campus coffee shop because they were not an approved group.

Petitioners' associational interests also were circumscribed by the denial of the use of campus bulletin boards and the school newspaper. If an organization is to remain a viable entity in a campus community in which new students enter on a regular basis, it must possess the means of communicating with these students. Moreover, the organization's ability to participate in the intellectual give and take of campus debate, and to pursue its stated purposes, is limited by denial of access to the customary media for communicating with the admin-

istration, faculty members, and other students.[8] Such impediments cannot be viewed as insubstantial.

Respondents and the courts below appear to have taken the view that denial of official recognition in this case abridged no constitutional rights. The District Court concluded that

> "President James' discretionary action in denying this application cannot be legitimately magnified and distorted into a constitutionally cognizable interference with the personal ideas or beliefs of any segment of the college students; neither does his action deter in any material way the individual advocacy of their personal beliefs; nor can his action be reasonably construed to be an invasion of, or having a chilling effect on academic freedom." 319 F. Supp., at 116.

In that court's view all that was denied petitioners was the "administrative seal of official college respectability."[9] *Ibid.* A majority of the Court of Appeals agreed that petitioners had been denied only the "college's stamp of approval." 445 F. 2d, at 1131. Respondents take that same position here, arguing that petitioners still may meet as a group off campus, that

[8] It is unclear on this record whether recognition also carries with it a right to seek funds from the school budget. Petitioners' counsel at oral argument indicated that official recognition entitled the group to "make application for use of student funds." Tr. of Oral Arg. 4. The first District Court opinion, however, states flatly that "[r]ecognition does not thereby entitle an organization to college financial support." 311 F. Supp. 1275, 1277. Since it appears that, at the least, recognition only entitles a group to *apply* for funds, and since the record is silent as to the criteria used in allocating such funds, we do not consider possible funding as an associational aspect of nonrecognition in this case.

[9] These statements are in contrast to the first opinion by the District Court, which reflected a full appreciation of the constitutional significance of petitioners' claim. 311 F. Supp., at 1280–1282.

they still may distribute written material off campus, and that they still may meet together informally on campus—as individuals, but not as CCSC-SDS.

We do not agree with the characterization by the courts below of the consequences of nonrecognition. We may concede, as did Mr. Justice Harlan in his opinion for a unanimous Court in *NAACP* v. *Alabama ex rel. Patterson,* 357 U. S., at 461, that the administration "has taken no direct action . . . to restrict the rights of [petitioners] to associate freely . . . ." But the Constitution's protection is not limited to direct interference with fundamental rights. The requirement in *Patterson* that the NAACP disclose its membership lists was found to be an impermissible, though indirect, infringement of the members' associational rights. Likewise, in this case, the group's possible ability to exist outside the campus community does not ameliorate significantly the disabilities imposed by the President's action. We are not free to disregard the practical realities. MR. JUSTICE STEWART has made the salient point: "Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates* v. *City of Little Rock,* 361 U. S. 516, 523 (1960). See also *Sweezy* v. *New Hampshire,* 354 U. S., at 263 (Frankfurter, J., concurring in result); *Watkins* v. *United States,* 354 U. S. 178, 197 (1957).

The opinions below also assumed that petitioners had the burden of showing entitlement to recognition by the College.[10] While petitioners have not challenged the procedural requirement that they file an application in conformity with the rules of the College,[11] they do

[10] 445 F. 2d, at 1131; 319 F. Supp., at 116.

[11] The standards for official recognition require applicants to provide a clear statement of purposes, criteria for membership, rules of procedure, and a list of officers. Applicants must limit member-

question the view of the courts below that final rejection could rest on their failure to convince the administration that their organization was unaffiliated with the National SDS. For reasons to be stated later in this opinion, we do not consider the issue of affiliation to be a controlling one. But, apart from any particular issue, once petitioners had filed an application in conformity with the requirements, the burden was upon the College administration to justify its decision of rejection. See, *e. g., Law Students Civil Rights Research Council* v. *Wadmond,* 401 U. S. 154, 162–163 (1971); *United States* v. *O'Brien,* 391 U. S. 367, 376–377 (1968); *Speiser* v. *Randall,* 357 U. S. 513 (1958). It is to be remembered that the effect of the College's denial of recognition was a form of prior restraint, denying to petitioners' organization the range of associational activities described above. While a college has a legitimate interest in preventing disruption on the campus, which under circumstances requiring the safeguarding of that interest may justify such restraint, a "heavy burden" rests on the college to demonstrate the appropriateness of that action. See *Near* v. *Minnesota,* 283 U. S. 697, 713–716 (1931); *Organization for a Better Austin* v. *Keefe,* 402 U. S. 415, 418 (1971); *Freedman* v. *Maryland,* 380 U. S. 51, 57 (1965).

## III

These fundamental errors—discounting the existence of a cognizable First Amendment interest and misplac-

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ship to "matriculated students" and may not discriminate on the basis of race, religion or nationality. The standards further state that groups may "examine and discuss all questions of interest," and they may conduct demonstrations and utilize their right of petition, but they are prohibited from interfering with the rights of other students. See n. 5, *supra.* Petitioners have not challenged these standards and their validity is not here in question.

ing the burden of proof—require that the judgments below be reversed. But we are unable to conclude that no basis exists upon which nonrecognition might be appropriate. Indeed, based on a reasonable reading of the ambiguous facts of this case, there appears to be at least one potentially acceptable ground for a denial of recognition. Because of this ambiguous state of the record we conclude that the case should be remanded, and, in an effort to provide guidance to the lower courts upon reconsideration, it is appropriate to discuss the several bases of President James' decision. Four possible justifications for nonrecognition, all closely related, might be derived from the record and his statements. Three of those grounds are inadequate to substantiate his decision: a fourth, however, has merit.

A

From the outset the controversy in this case has centered in large measure around the relationship, if any, between petitioners' group and the National SDS. The Student Affairs Committee meetings, as reflected in its minutes, focused considerable attention on this issue; the court-ordered hearing also was directed primarily to this question. Despite assurances from petitioners and their counsel that the local group was in fact independent of the National organization, it is evident that President James was significantly influenced by his apprehension that there was a connection. Aware of the fact that some SDS chapters had been associated with disruptive and violent campus activity, he apparently considered that affiliation itself was sufficient justification for denying recognition.[12]

Although this precise issue has not come before the Court heretofore, the Court has consistently disapproved

[12] See n. 4, *supra*, for the complete text of the President's statement.

governmental action imposing criminal sanctions or denying rights and privileges solely because of a citizen's association with an unpopular organization. See, *e. g.*, *United States* v. *Robel,* 389 U. S. 258 (1967); *Keyishian* v. *Board of Regents,* 385 U. S., at 605–610; *Elfbrandt* v. *Russell,* 384 U. S. 11 (1966); *Scales* v. *United States,* 367 U. S. 203 (1961). In these cases it has been established that "guilt by association alone, without [establishing] that an individual's association poses the threat feared by the Government," is an impermissible basis upon which to deny First Amendment rights. *United States* v. *Robel, supra,* at 265. The government has the burden of establishing a knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims.[13]

Students for a Democratic Society, as conceded by the College and the lower courts, is loosely organized, having various factions and promoting a number of diverse social and political views, only some of which call for unlawful action.[14] Not only did petitioners proclaim their complete independence from this organization,[15] but they also

[13] In addition to the cases cited in the text above, see also *Law Students Civil Rights Research Council* v. *Wadmond,* 401 U. S. 154, 164–166 (1971); *In re Stolar,* 401 U. S. 23, 28 (1971); *Aptheker* v. *Secretary of State,* 378 U. S. 500 (1964); *Noto* v. *United States,* 367 U. S. 290, 299–300 (1961).

[14] See Hearings before a Subcommittee of the House Committee on Appropriations, 92d Cong., 2d Sess., pt. 1, p. 916 (1972), in which the former Director of the Federal Bureau of Investigation, J. Edgar Hoover, stated that while violent factions have spun off from SDS, its present leadership is "critical of bombing and violence."

[15] Petitioners asserted their independence both orally and in a written submission before the Student Affairs Committee. They restated their nonaffiliation in a formal statement filed prior to the court-ordered hearing. The only indication to the contrary is their unwillingness to eschew use of the SDS name altogether. But see n. 3, *supra.*

indicated that they shared only some of the beliefs its leaders have expressed.[16] On this record it is clear that the relationship was not an adequate ground for the denial of recognition.

B

Having concluded that petitioners were affiliated with, or at least retained an affinity for, National SDS, President James attributed what he believed to be the philosophy of that organization to the local group. He characterized the petitioning group as adhering to "some of the major tenets of the national organization," including a philosophy of violence and disruption.[17] Understandably, he found that philosophy abhorrent. In an article signed by President James in an alumni periodical, and made a part of the record below, he announced his unwillingness to "sanction an organization that openly advocates the destruction of the very ideals and freedoms upon which the academic life is founded." He further emphasized that the petitioners' "philosophies" were "counter to the official policy of the college."

The mere disagreement of the President with the group's philosophy affords no reason to deny it recognition. As repugnant as these views may have been, especially to one with President James' responsibility, the mere expression of them would not justify the denial of First Amendment rights. Whether petitioners did in fact advocate a phi osophy of "destruction" thus becomes immaterial. The College, acting here as the instrumentality of the State, may not restrict speech or association simply because it finds the views expressed

[16] Representatives of the group stated during the Student Affairs Committee meetings that they did not identify with all of the National's statements, but wished simply to "pick . . . certain ideas" from that organization.

[17] See n. 4, *supra.*

by any group to be abhorrent. As Mr. Justice Black put it most simply and clearly:

> "I do not believe that it can be too often repeated that the freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish." *Communist Party* v. *SACB*, 367 U. S. 1, 137 (dissenting opinion) (1961).

C

As the litigation progressed in the District Court, a third rationale for President James' decision—beyond the questions of affiliation and philosophy—began to emerge. His second statement, issued after the court-ordered hearing, indicates that he based rejection on a conclusion that this particular group would be a "disruptive influence at CCSC." This language was underscored in the second District Court opinion. In fact, the court concluded that the President had determined that CCSC-SDS' "prospective campus activities were likely to cause a disruptive influence at CCSC." 319 F. Supp., at 116.

If this reason, directed at the organization's activities rather than its philosophy, were factually supported by the record, this Court's prior decisions would provide a basis for considering the propriety of nonrecognition. The critical line heretofore drawn for determining the permissibility of regulation is the line between mere advocacy and advocacy "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action." *Brandenburg* v. *Ohio*, 395 U. S. 444, 447 (1969) (unanimous *per curiam* opinion). See also *Scales* v. *United States*, 367 U. S., at 230–232; *Noto* v. *United States*, 367 U. S. 290, 298 (1961);

*Yates* v. *United States,* 354 U. S. 298 (1957). In the context of the "special characteristics of the school environment," [18] the power of the government to prohibit "lawless action" is not limited to acts of a criminal nature. Also prohibitable are actions which "materially and substantially disrupt the work and discipline of the school." *Tinker* v. *Des Moines Independent School District,* 393 U. S., at 513. Associational activities need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education.

The "Student Bill of Rights" at CCSC, upon which great emphasis was placed by the President, draws precisely this distinction between advocacy and action. It purports to impose no limitations on the right of college student organizations "to examine and discuss *all* questions of interest to them." (Emphasis supplied.) But it also states that students have no right (1) "to deprive others of the opportunity to speak or be heard," (2) "to invade the privacy of others," (3) "to damage the property of others," (4) "to disrupt the regular and essential operation of the college," or (5) "to interfere with the rights of others." [19] The line between permissible speech and impermissible conduct tracks the constitutional requirement, and if there were an evidential basis to support the conclusion that CCSC-SDS posed a substantial threat of material disruption in violation of that command the President's decision should be affirmed.[20]

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[18] *Tinker* v. *Des Moines Independent School District,* 393 U. S. 503, 506 (1969).

[19] See n. 5, *supra.*

[20] It may not be sufficient merely to show the existence of a legitimate and substantial state interest. Where state action designed to regulate prohibitable action also restricts associational rights—as nonrecognition does—the State must demonstrate that the action

The record, however, offers no substantial basis for that conclusion. The only support for the view expressed by the President, other than the reputed affiliation with National SDS, is to be found in the ambivalent responses offered by the group's representatives at the Student Affairs Committee hearing, during which they stated that they did not know whether they might respond to "issues of violence" in the same manner that other SDS chapters had on other campuses. Nor would they state unequivocally that they could never "envision . . . interrupting a class." Whatever force these statements might be thought to have is largely dissipated by the following exchange between petitioners' counsel and the Dean of Student Affairs during the court-ordered hearing:

> Counsel: ". . . I just read the document that you're offering [minutes from Student Affairs Committee meeting] and I can't see that there's anything in it that intimates that these students contemplate any illegal or disruptive practice."
>
> Dean: "No. There's no question raised to that, counselor . . . ." App. 73–74.

Dean Judd's remark reaffirms, in accord with the full record, that there was no substantial evidence that these particular individuals acting together would con-

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taken is reasonably related to protection of the State's interest and that "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States* v. *O'Brien*, 391 U. S. 367, 377 (1968). See also *NAACP* v. *Alabama ex rel. Flowers*, 377 U. S. 288 (1964); *Gibson* v. *Florida Legislative Investigation Committee*, 372 U. S. 539, 546 (1963); *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449 (1958). On this record, absent a showing of any likelihood of disruption or unwillingness to recognize reasonable rules governing campus conduct, it is not necessary for us to decide whether denial of recognition is an appropriately related and narrow response.

stitute a disruptive force on campus. Therefore, insofar as nonrecognition flowed from such fears, it constituted little more than the sort of "undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of expression." *Tinker* v. *Des Moines Independent School District,* 393 U. S., at 508.

D

These same references in the record to the group's equivocation regarding how it might respond to "issues of violence" and whether it could ever "envision . . . interrupting a class," suggest a fourth possible reason why recognition might have been denied to these petitioners. These remarks might well have been read as announcing petitioners' unwillingness to be bound by reasonable school rules governing conduct. The College's Statement of Rights, Freedoms, and Responsibilities of Students contains, as we have seen, an explicit statement with respect to campus disruption. The regulation, carefully differentiating between advocacy and action, is a reasonable one, and petitioners have not questioned it directly.[21] Yet their statements raise considerable question whether they intend to abide by the prohibitions contained therein.[22]

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[21] See n. 5, *supra.*

[22] The Court of Appeals found that petitioners "failed candidly to respond to inquiries whether they would resort to violence and disruption on the CCSC campus, including interruption of classes." 445 F. 2d, at 1131. While petitioners' statements may be read as intimating a rejection of reasonable regulations in advance, there is in fact substantial ambiguity on this point. The questions asked by members of the Student Affairs Committee do not appear to have been propounded with any clear distinction in mind between that which the petitioners might advocate and the conduct in which they might engage. Nor did the Student Affairs Committee attempt to obtain a clarification of the petitioners' ambiguous answers by

As we have already stated in Parts B and C, the critical line for First Amendment purposes must be drawn between advocacy, which is entitled to full protection, and action, which is not. Petitioners may, if they so choose, preach the propriety of amending or even doing away with any or all campus regulations. They may not, however, undertake to flout these rules. MR. JUSTICE BLACKMUN, at the time he was a circuit judge on the Eighth Circuit, stated:

> "We . . . hold that a college has the inherent power to promulgate rules and regulations; that it has the inherent power properly to discipline; that it has power appropriately to protect itself and its property; that it may expect that its students adhere to generally accepted standards of conduct." *Esteban* v. *Central Missouri State College*, 415 F. 2d 1077, 1089 (CA8 1969), cert. denied, 398 U. S. 965 (1970).

Just as in the community at large, reasonable regulations with respect to the time, the place, and the manner in which student groups conduct their speech-related

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asking specifically whether the group was willing to abide by the Student Bill of Rights governing all campus organizations.

Moreover, this question was not among those referred by the District Court to the administrative hearing, and it was there addressed only tangentially. The group members who had made statements before the Student Affairs Committee did not testify, and their position was not clarified. Their counsel, whose tactics were characterized as "disruptive" by the Court of Appeals, elected to make argumentative statements rather than elicit relevant testimony. *Id.*, at 1126. Indeed, the District Court's failure to identify the question of willingness to abide by the College's rules and regulations as a significant subject of inquiry, coupled with the equivocation on the part of the group's representatives, lends support to our view that a remand is necessary.

activities must be respected.[23] A college administration may impose a requirement, such as may have been imposed in this case, that a group seeking official recognition affirm in advance its willingness to adhere to reasonable campus law. Such a requirement does not impose an impermissible condition on the students' associational rights. Their freedom to speak out, to assemble, or to petition for changes in school rules is in no sense infringed. It merely constitutes an agreement to conform with reasonable standards respecting conduct. This is a minimal requirement, in the interest of the entire academic community, of any group seeking the privilege of official recognition.

Petitioners have not challenged in this litigation the procedural or substantive aspects of the College's requirements governing applications for official recognition. Although the record is unclear on this point, CCSC may have, among its requirements for recognition, a rule that prospective groups affirm that they intend to comply with reasonable campus regulations. Upon remand it should first be determined whether the College recognition procedures contemplate any such requirement. If so, it should then be ascertained whether petitioners intend to comply. Since we do not have the terms of a specific prior affirmation rule before us, we are not called on to decide whether any particular formulation would or would not prove constitutionally acceptable. Assuming the existence of a valid rule, however, we do conclude that the benefits of participation in the internal life of the college community may be denied to any

[23] See, *e. g., Adderley* v. *Florida,* 385 U. S. 39, 47–48 (1966); *Cox* v. *Louisiana,* 379 U. S. 536, 558 (1965); *Louisiana ex rel. Gremillion* v. *NAACP,* 366 U. S. 293, 297 (1961).

group that reserves the right to violate any valid campus rules with which it disagrees.[24]

## IV

We think the above discussion establishes the appropriate framework for consideration of petitioners' request for campus recognition. Because respondents failed to accord due recognition to First Amendment principles, the judgments below approving respondents' denial of recognition must be reversed. Since we cannot conclude from this record that petitioners were willing to abide by reasonable campus rules and regulations, we order the case remanded for reconsideration. We note, in so holding, that the wide latitude accorded by the Constitution to the freedoms of expression and association is not without its costs in terms of the risk to the maintenance of civility and an ordered society. Indeed, this latitude often has resulted, on the campus and elsewhere, in the infringement of the rights of others. Though we deplore the tendency of some to abuse the very constitutional privileges they invoke, and although the infringement of rights of others certainly should not be tolerated, we reaffirm this Court's dedication to the principles of the Bill of Rights upon which our vigorous and free society is founded.

*Reversed and remanded.*

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[24] In addition to the College administration's broad rulemaking power to assure that the traditional academic atmosphere is safeguarded, it may also impose sanctions on those who violate the rules. We find, for instance, that the Student Affairs Committee's admonition to petitioners in this case suggests one permissible practice—recognition, once accorded, may be withdrawn or suspended if petitioners fail to respect campus law. See, *e. g., University of Southern Mississippi Chapter of Mississippi Civil Liberties Union* v. *University of Southern Mississippi,* 452 F. 2d 564 (CA5 1971); *American Civil Liberties Union* v. *Radford College,* 315 F. Supp. 893 (WD Va. 1970).

MR. CHIEF JUSTICE BURGER, concurring.

I am in agreement with what is said in the Court's opinion and I join in it. I do so because I read the basis of the remand as recognizing that student organizations seeking the privilege of official campus recognition must be willing to abide by valid rules of the institution applicable to all such organizations. This is a reasonable condition insofar as it calls for the disavowal of resort to force, disruption, and interference with the rights of others.

The District Judge was troubled by the lack of a comprehensive procedural scheme that would inform students of the steps to be taken to secure recognized standing, and by the lack of articulated criteria to be used in evaluating eligibility for recognition. It was for this reason, as I read the record, that he remanded the matter to the college for a factual inquiry and for a more orderly processing in a *de novo* hearing within the college administrative structure. It is within that structure and within the academic community that problems such as these should be resolved. The courts, state or federal, should be a last resort. Part of the educational experience of every college student should be an experience in responsible self-government and this must be a joint enterprise of students and faculty. It should not be imposed unilaterally from above, nor can the terms of the relationship be dictated by students. Here, in spite of the wisdom of the District Court in sending the case back to the college, the issue identified by the Court's opinion today was not adequately addressed in the hearing.

The relatively placid life of the college campus of the past has not prepared either administrators or students for their respective responsibilities in maintaining an atmosphere in which divergent views can be asserted

vigorously, but civilly, to the end that those who seek to be heard accord the same right to all others. The "Statement on Rights, Freedoms and Responsibilities of Students," sometimes called the "Student Bill of Rights," in effect on this campus, and not questioned by petitioners, reflected a rational adjustment of the competing interests. But it is impossible to know from the record in this case whether the student group was willing to acknowledge an obligation to abide by that "Bill of Rights."

Against this background, the action of the Court in remanding on this issue is appropriate.

MR. JUSTICE DOUGLAS.

While I join the opinion of the Court, I add a few words.

As Dr. Birenbaum* says, the status quo of the college or university is the governing body (trustees or overseers), administrative officers, who include caretakers, and the police, and the faculty. Those groups have well-defined or vaguely inferred values to perpetuate. The customary technique has been to conceive of the minds of students as receptacles for the information which the faculty have garnered over the years. Education is commonly thought of as the process of filling the receptacles with what the faculty in its wisdom deems fit and proper.

Many, inside and out of faculty circles, realize that one of the main problems of faculty members is their own re-education or re-orientation. Some have narrow specialties that are hardly relevant to modern times. History has passed others by, leaving them interesting relics of a bygone day. More often than not they represent those who withered under the pressures of McCarthyism or other forces of conformity and represent

*See the Appendix to this opinion.

but a timid replica of those who once brought distinction to the ideal of academic freedom.

The confrontation between them and the oncoming students has often been upsetting. The problem is not one of choosing sides. Students—who, by reason of the Twenty-sixth Amendment, become eligible to vote when 18 years of age—are adults who are members of the college or university community. Their interests and concerns are often quite different from those of the faculty. They often have values, views, and ideologies that are at war with the ones which the college has traditionally espoused or indoctrinated. When they ask for change, they, the students, speak in the tradition of Jefferson and Madison and the First Amendment.

The First Amendment does not authorize violence. But it does authorize advocacy, group activities, and espousal of change.

The present case is minuscule in the events of the 60's and 70's. But the fact that it has to come here for ultimate resolution indicates the sickness of our academic world, measured by First Amendment standards. Students as well as faculty are entitled to credentials in their search for truth. If we are to become an integrated, adult society, rather than a stubborn status quo opposed to change, students and faculties should have communal interests in which each age learns from the other. Without ferment of one kind or another, a college or university (like a federal agency or other human institution) becomes a useless appendage to a society which traditionally has reflected the spirit of rebellion.

## APPENDIX TO OPINION OF DOUGLAS, J.

"A compulsory ghetto fails as a community because its inhabitants lack the power to develop common goals and to pursue them effectively together. It fails too

because of a fatal disconnection between the possession and use of power and the cognition that knowledge, as a form of power, carries with it political responsibility. In these respects the campus is now like the compulsory ghetto.

"Those who deplore a view of the university in terms of its powerful political role in American society must account for the institution's use of political power in its own terms, for its own purposes. I have come to feel lately—partly, I guess, because of the legal reasoning styles to which I have been exposed—that those playing around with the structure of their universities these days are playing with tinker toys. New committees, new senates and new student-participation formulae do not necessarily mean that anything has changed. Indeed, if Berkeley, Columbia, Harvard and Chicago are valid examples, restructuring turns out to be one of the brilliant new inventions for sustaining the status quo. The vested interests and essential privileges involved in current efforts to restructure the university have yet completely to surface. A substantial part of our melting iceberg is still below the waterline.

"That part of the student critique of the university which most deserves our attention bears upon what we teach, how we teach it, and the terms on which it is taught. One of the interesting things their critique points out is that our building programs, corporate investments, relationships to the immediate community and to the society, and our views of citizenship inside the university, all turn out to be projections and applications of what *we* call or have called education. Their critique suggests the perfectly absurd conclusion that there is a relationship between their long hair and our long war, between being a nurse and being a Negro, between the freshman political-science course and the pollution of fresh air, between education for freedom and

being free. Obviously, the contemporary American student activist is crazy.

"We have probably made a mistake by revealing to our students that there really is too much to know, and only one way to learn it—our way. They have come to accept this as gospel, and it has encouraged them to view curriculum development as essentially a sophisticated art of selection, interpretation and emphasis in which *they* have a vested interest. Understanding this, naturally they have begun to ask the key political questions bearing upon *our* vested interests and privileges: What experience and talent should be empowered to select? Who should be empowered to employ those who will interpret, and to deploy the wealth required to support the enterprise?

"Obviously the control over who will be kept out and over punishment-and-reward systems inside is extremely important. While our students still generally concede that the older adults who teach them may know something they don't, they are also asserting the uniqueness of their own experience, claiming that they may know something which those now in charge don't. They have returned to the kindergarten level to rediscover a principle long revered in American education—that the student plays a positive and active role, that he has something definite and essential to contribute to his own education.

"The young—suspended precariously in a society obsessed by Vietnam violence, race violence, crime violence and culture violence—are restating the eternal questions about education: What is important to learn, and how may people best learn together? Regarding these enduring questions, they are also asking the eternal question of a society which officially encourages its young to grow up free (even while keeping them in bondage), namely: Who shall judge? Regarding the problems

these questions suggest, academic tradition responds through an uptight delineation of jurisdictions and powers within the university.

. . . . .

"Today's campus disruptions were born in the years 1776 to 1787. Although the mind of Thomas Jefferson was anchored in the traditions of Heidelberg, Oxford, Paris, Bologna, Rome, Greece, the religions of the early Christians and the ancient Hebrews, minds like his transformed the old into something quite new, as in the case of his proposal for a university in Virginia. What was created then was not, of course, the latest thing, nor was it necessarily the Truth. But it was an adventure, a genuine new departure, unlike most of the institutions of learning we have created in this country since the Morrill Act—that is, most of our higher-education establishment.

"The traditions of the university in the West are anti- if not counter-revolutionary. Operating within these traditions, the university has produced revolutionary knowledge, but institutionally the uses of the knowledge have been directed mainly toward the confirmation of the status quo, particularly the political and cultural status quo. The themes of peace, integration, equality, freedom and the humane uses of knowledge are ones which traditionally fall beyond the purview of the university.

"But in principle the main themes of our society run counter to this deployment of knowledge. In spite of Vietnam, poverty, racism and the overbearing logic of our technology—in spite of Bedford-Stuyvesant—the main themes of our country, in principle, were and still are revolutionary. They are reflected in such questions as these: Can the revolutionary knowledge developed in the universities be used humanely, to conform with what Jefferson and his colleagues apparently meant? What

does equality mean, and whatever it meant or means, can we still achieve a version of it consistent with this adventure? Are reason and democracy really consistent? Is war in behalf of peace, given what we know now, realistic? Can Negroes who were once property suddenly become people? Are some genocides more decent than others, some cesspools more fragrant than others?

"In any event, I *know* that Bedford-Stuyvesant is crammed full of red-white-and-blue Americans. They really believe that we ought to practice what we preach, and that's the problem. We've oversold America to ourselves, and so many of my very good friends—looking at the street violence and the circuses in the courts and on the campuses—who believe we confront a deeply un-American phenomenon, who think we face a serious threat to American values, completely misread what is going on there. We face a vibrant, far-reaching reassertion of what this country claims, what it has always claimed it is." W. Birenbaum, Something For Everybody Is Not Enough 67–69, 248–249.

MR. JUSTICE REHNQUIST, concurring in the result.

While I do not subscribe to some of the language in the Court's opinion, I concur in the result that it reaches. As I understand the Court's holding, the case is sent back for reconsideration because respondents may not have made it sufficiently clear to petitioners that the decision as to recognition would be critically influenced by petitioners' willingness to agree in advance to abide by reasonable regulations promulgated by the college.

I find the implication clear from the Court's opinion that the constitutional limitations on the government's acting as administrator of a college differ from the limitations on the government's acting as sovereign to enforce its criminal laws. The Court's quotations from *Tinker*

v. *Des Moines Independent School District,* 393 U. S. 503, 506 (1969), to the effect that First Amendment rights must always be applied "in light of the special characteristics of the . . . environment," and from *Esteban* v. *Central Missouri State College,* 415 F. 2d 1077, 1089 (CA8 1969), to the effect that a college "may expect that its students adhere to generally accepted standards of conduct," emphasize this fact.

Cases such as *United Public Workers* v. *Mitchell,* 330 U. S. 75 (1947), and *Pickering* v. *Board of Education,* 391 U. S. 563 (1968), make it equally clear that the government in its capacity as employer also differs constitutionally from the government in its capacity as the sovereign executing criminal laws. The Court in *Pickering* said:

> "The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." 391 U. S., at 568.

Because of these acknowledged distinctions of constitutional dimension based upon the role of the government, I have serious doubt as to whether cases dealing with the imposition of criminal sanctions, such as *Brandenburg* v. *Ohio,* 395 U. S. 444 (1969), *Scales* v. *United States,* 367 U. S. 203 (1961), and *Yates* v. *United States,* 354 U. S. 298 (1957), are properly applicable to this case dealing with the government as college administrator. I also doubt whether cases dealing with the prior restraint imposed by injunctive process of a court, such as *Near* v. *Minnesota,* 283 U. S. 697 (1931), are precisely comparable to this case, in which a typical sanction imposed was the requirement that the group abandon its plan to meet in the college coffee shop.

Prior cases dealing with First Amendment rights are not fungible goods, and I think the doctrine of these cases suggests two important distinctions. The government as employer or school administrator may impose upon employees and students reasonable regulations that would be impermissible if imposed by the government upon all citizens. And there can be a constitutional distinction between the infliction of criminal punishment, on the one hand, and the imposition of milder administrative or disciplinary sanctions, on the other, even though the same First Amendment interest is implicated by each.

Because some of the language used by the Court tends to obscure these distinctions, which I believe to be important, I concur only in the result.

Syllabus

# CITY OF HOUSTON, TEXAS *v.* HILL

## APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 86-243. Argued March 23, 1987—Decided June 15, 1987

Upon shouting at police in an attempt to divert their attention from his friend during a confrontation, appellee was arrested for "wilfully . . . interrupt[ing] a city policeman . . . by verbal challenge during an investigation" in violation of a municipal ordinance making it unlawful for any person "to assault, strike or in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty." After his acquittal in Municipal Court, appellee brought suit in Federal District Court challenging the ordinance's constitutionality and seeking, *inter alia*, damages and attorney's fees. The District Court held that the ordinance was not unconstitutionally vague or overbroad on its face, but the Court of Appeals reversed, finding that the ordinance was substantially overbroad since its literal wording punished and might deter a significant range of protected speech.

*Held:*

1. A municipal ordinance that makes it unlawful to interrupt a police officer in the performance of his duty is substantially overbroad and therefore invalid on its face under the First Amendment. The ordinance in question criminalizes a substantial amount of, and is susceptible of regular application to, constitutionally protected speech, and accords the police unconstitutional enforcement discretion, as is demonstrated by evidence indicating that, although the ordinance's plain language is violated scores of times daily, only those individuals chosen by police in their unguided discretion are arrested. Appellant's argument that the ordinance is not substantially overbroad because it does not inhibit the exposition of ideas, but simply bans unprotected "core criminal conduct," is not persuasive. Since the ordinance's language making it unlawful to "assault" or "strike" a police officer is expressly pre-empted by the State Penal Code, its enforceable portion prohibits verbal interruptions of police and thereby deals with speech rather than with core criminal conduct. Moreover, although speech might be prohibited if it consists of "fighting words" that by their very utterance inflict injury or tend to incite an immediate breach of the peace, the ordinance in question is not limited to such expressions but broadly applies to speech that "in any manner . . . interrupt[s] any policeman" and thereby impermissibly infringes the constitutionally protected freedom of individuals verbally to

oppose or challenge police action. Appellant's contention that the ordinance's sweeping nature is both inevitable and essential to maintain public order is also without merit, since the ordinance is not narrowly tailored to prohibit only disorderly conduct or fighting words, but impermissibly provides police with unfettered discretion to arrest individuals for words or conduct that are simply annoying or offensive. Pp. 458–467.

2. Abstention—assertedly to allow the state courts to reach a readily available limiting construction that would eliminate the ordinance's overbreadth—would be inappropriate here. Even if this case did not involve a First Amendment facial challenge, for which abstention is particularly inappropriate, the ordinance in question is plain and unambiguous and thus is not susceptible to a limiting construction. Moreover, it cannot be limited by severing discrete unconstitutional subsections since its enforceable portion is unconstitutional in its entirety. Even if the municipal courts had not had many opportunities to narrow the ordinance's scope, appellant's claim that state courts had not had the chance to construe the ordinance would be unavailing in light of the ordinance's nonambiguity. Nor does the availability of certification to state courts under state law in itself render abstention appropriate where, as here, there is no uncertain question of state law to be resolved. Pp. 467–471.

3. Although the preservation of liberty depends in part upon the maintenance of social order, the First Amendment requires that officers and municipalities respond with restraint in the face of verbal challenges to police action, since a certain amount of expressive disorder is inevitable in a society committed to individual freedom and must be protected if that freedom would survive. Pp. 471–472.

789 F. 2d 1103, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. BLACKMUN, J., filed a concurring opinion, *post*, p. 472. SCALIA, J., filed an opinion concurring in the judgment, *post*, p. 472. POWELL, J., filed an opinion concurring in the judgment in part and dissenting in part, in which O'CONNOR, J., joined, in Parts I and II of which REHNQUIST, C. J., joined, and in Parts II and III of which SCALIA, J., joined, *post*, p. 473. REHNQUIST, C. J., filed a dissenting opinion, *post*, p. 481.

*Robert J. Collins* argued the cause for appellant. With him on the briefs was *Jerry Edwin Smith*.

*Charles Alan Wright* argued the cause for appellee. With him on the brief were *Michael A. Maness* and *Gerald M. Birnberg.**

JUSTICE BRENNAN delivered the opinion of the Court.

This case presents the question whether a municipal ordinance that makes it unlawful to interrupt a police officer in the performance of his or her duties is unconstitutionally overbroad under the First Amendment.

I

Appellee Raymond Wayne Hill is a lifelong resident of Houston, Texas. At the time this lawsuit began, he worked as a paralegal and as executive director of the Houston Human Rights League. A member of the board of the Gay Political Caucus, which he helped found in 1975, Hill was also affiliated with a Houston radio station, and had carried city and county press passes since 1975. He lived in Montrose, a "diverse and eclectic neighborhood" that is the center of gay political and social life in Houston. App. 26–27.

The incident that sparked this lawsuit occurred in the Montrose area on February 14, 1982. Hill observed a friend, Charles Hill, intentionally stopping traffic on a busy street, evidently to enable a vehicle to enter traffic. Two Houston police officers, one of whom was named Kelley, approached Charles and began speaking with him. According to the District Court, "shortly thereafter" Hill began shouting at the officers "in an admitted attempt to divert Kelley's attention from Charles Hill." App. to Juris. Statement B–2.[1] Hill

*Alvin Bronstein, David Goldstein, Burt Neuborne, James Harrington,* and *Bruce Griffiths* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

[1] Hill testified that his "motivation was to stop [the officers] from hitting Charles." App. 37, 40. See n. 2, *infra*. He also explained: "I would rather that I get arrested than those whose careers can be damaged; I would rather that I get arrested than those whose families wouldn't understand; I would rather that I get arrested than those who couldn't spend a long time in jail. I am prepared to respond in any legal, nonaggressive or

first shouted: "Why don't you pick on somebody your own size?" After Officer Kelley responded: "[A]re you interrupting me in my official capacity as a Houston police officer?" Hill then shouted: "Yes, why don't you pick on somebody my size?" App. 40–41, 58, 71–74. Hill was arrested under Houston Code of Ordinances, § 34–11(a), for "wilfully or intentionally interrupt[ing] a city policeman . . . by verbal challenge during an investigation." App. 2. Charles Hill was not arrested. Hill was then acquitted after a nonjury trial in Municipal Court.[2]

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nonviolent way, to any illegal police activity, at any time, under any circumstances." *Id.*, at 29.

[2] The District Court stated that Hill "shout[ed] *abuses*" at the officers, App. to Juris. Statement B–2 (emphasis added). As the Court of Appeals held, however, there is "no evidence to support the district court's finding that Raymond [Hill] 'shout[ed] abuses' at Officer Kelley." 789 F. 2d 1103, 1105 (CA5 1986). See App. 73–74 (testimony of Officer Kelley that Hill did not use "abusive" language).

The testimony of Hill and Kelley is consistent in other ways ignored by the District Court. Both agree, for example, that Charles attempted to leave after an initial conversation with the officers, and that Kelley then grabbed Charles by the arm, turned him around, and told him not to walk away. *Id.*, at 14, 57. According to Hill, Charles, who "has a nervous tic," then went "into these spasms," which prompted one of the officers to "screa[m]" at Charles "Are you making fun of me?" *Id.*, at 14–15. Kelley stated that Charles was "twitching" in an "erratic and strange" manner, and that Kelley "didn't know if [Charles] was about to have a seizure or if he was being insolent or what." *Id.*, at 56–57.

At this point, however, the testimony substantially diverges. Kelley states that Hill then "interrupte[d]" him with the verbal challenge quoted in text, and that a crowd was beginning to form. *Id.*, at 57–58, 61, 68–69. Hill testified that both officers grabbed Charles, placed him up against a wall, and threatened to hit him with a large flashlight. *Id.*, at 14. Only then, according to Hill, did he call out: "[T]he kid has done nothing wrong. If you want to pick on somebody, pick on me." *Id.*, at 16. We note the applicability of JUSTICE POWELL's observation that there is a "possibility of abuse" where convictions under an ordinance frequently turn on the resolution of a "direct conflict of testimony as to 'who said what.'" *Lewis* v. *City of New Orleans*, 415 U. S. 130, 135, n. (1974) (POWELL, J., concurring in result). See *infra*, at 466.

Code of Ordinances, City of Houston, Texas, § 34–11(a) (1984), reads:

> "Sec. 34–11. Assaulting or interfering with policemen.
>
> "(a) It shall be unlawful for any person to assault, strike or in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty, or any person summoned to aid in making an arrest."[3]

Following his acquittal in the Charles Hill incident, Hill brought the suit in the Federal District Court for the Southern District of Texas, seeking (1) a declaratory judgment that § 34–11(a) was unconstitutional both on its face and as it had been applied to him, (2) a permanent injunction against any attempt to enforce the ordinance, (3) an order expunging the records of his arrests under the ordinance, and (4) damages and attorney's fees under 42 U. S. C. §§ 1983 and 1988.

At trial, Hill introduced records provided by the city regarding both the frequency with which arrests had been made for violation of the ordinance and the type of conduct with which those arrested had been charged. He also introduced evidence and testimony concerning the arrests of several reporters under the ordinance. Finally, Hill introduced evidence regarding his own experience with the ordinance, under which he has been arrested four times since 1975, but never convicted.

The District Court held that Hill's evidence did not demonstrate that the ordinance had been unconstitutionally applied.[4] The court also rejected Hill's contention that the

[3] A conviction under the ordinance is a misdemeanor punishable by a fine of not more than $200. App. to Juris. Statement B–1.

[4] The facts of Hill's other three arrests as found by the District Court are as follows. On August 31, 1975, Hill intentionally interrupted two Houston police officers as they made a traffic arrest. During the arrest, Hill wrote down license plate numbers, and then walked to within an arm's length of one of the officers on the side nearest the officer's revolver. The officer asked Hill to leave, but Hill instead moved closer. Hill was arrested, tried, and found not guilty.

In 1977, after observing vice-squad cars parked near a bookstore, Hill entered the store and announced on the public address system that police

ordinance was unconstitutionally vague or overbroad on its face. The ordinance was not vague, the court stated, because:

> "[t]he wording of the ordinance is sufficiently definite to put a person of reasonable intelligence on fair notice of what actions are forbidden. In particular, the Court finds that the use of words such as 'interrupt' are sufficiently clear by virtue of their commonly-understood, everyday definitions. Interrupt commonly means to cause one to cease, such as stopping someone in the middle of something. The Plaintiff, for example, clearly 'interrupted' the police officers regarding the Charles Hill incident." App. to Juris. Statement B–8.

The court also held that the statute was not overbroad because "the ordinance does not, at least facially, proscribe speech or conduct which is protected by the First Amendment." *Id.*, at B–12.

A panel of the Court of Appeals reversed. 764 F. 2d 1156 (CA5 1985). The city's suggestion for rehearing en banc was granted, and the Court of Appeals, by a vote of 8–7, upheld the judgment of the panel. 789 F. 2d 1103 (1986). The Court of Appeals agreed with the District Court's conclusion that the ordinance was not vague, and that it "plainly encompasse[d] mere verbal as well as physical conduct." *Id.*, at 1109. Applying the standard established in *Broadrick* v. *Oklahoma*, 413 U. S. 601 (1973), however, the Court of Appeals concluded that the ordinance was substantially

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officers were present and that patrons should prepare to show their identification. The patrons promptly left the store, thereby frustrating the investigation. Hill was arrested for interfering with the investigation, but the case was subsequently dismissed.

Finally, on October 3, 1982, eight months after the lawsuit began, Hill was arrested for refusing to leave the immediate area of a car with an unknown and unconscious person inside. The arresting officers failed to appear in Municipal Court, however, so the charge against Hill was dismissed.

overbroad. It found that "[a] significant range of protected speech and expression is punishable and might be deterred by the literal wording of the statute." 789 F. 2d, at 1110.

The Court of Appeals also reviewed the evidence of the unconstitutional application of the ordinance which Hill had introduced at trial. The court did not disturb the District Court's ruling that the statute had not been unconstitutionally applied to Hill or to the reporters. It did conclude, however, that other evidence not mentioned by the District Court revealed "a realistic danger of, and a substantial potential for, the unconstitutional application of the ordinance." *Ibid.* This evidence showed that the ordinance "is officially regarded as penalizing the mere interruption of a policeman while in the line of duty," *id.*, at 1109, and has been employed to make arrests for, *inter alia*, "arguing," "[t]alking," "[i]nterfering," "[f]ailing to remain quiet," "[r]efusing to remain silent," "[v]erbal abuse," "[c]ursing," "[v]erbally yelling," and "[t]alking loudly, [w]alking through scene." *Id.*, at 1113–1114.[5]

The city appealed, claiming that the Court of Appeals erred in holding the ordinance facially overbroad and in not abstaining until the ordinance had been construed by the

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[5] These charges are summarized in an appendix to the opinion of the Court of Appeals, 789 F. 2d, at 1113–1114. The court noted that "[appellee] offered evidence of over 200 arrests that had been made for violation of the ordinance between November 1981 and March 1982. Violations are apparently so frequent that the City uses a printed form to report charges." *Id.*, at 1107. The form, entitled "Complaint: Interrupting a Policeman," contains the preprinted charge of "wilfully or intentionally interrupt[ing] a city policeman" that is followed by a blank in which the officer fills in a description of the basis for the charge. *Id.*, at 1108–1109. While noting that the majority of those arrested are charged with conduct that is "patently unlawful," the Court of Appeals observed that "[i]n many instances . . . the malefactor is described [in the handwritten portion] as having done nothing more offensive to the public order than speaking or failing to remain silent." *Id.*, at 1109. Over a third of these arrests were never prosecuted. *Id.*, at 1110.

state courts.[6] We noted probable jurisdiction, 479 U. S. 811 (1986), and now affirm.

## II

The elements of First Amendment overbreadth analysis are familiar. Only a statute that is substantially overbroad may be invalidated on its face. *New York* v. *Ferber*, 458 U. S. 747, 769 (1982); *Broadrick* v. *Oklahoma*, *supra*. "We have never held that a statute should be held invalid on its face merely because it is possible to conceive of a single impermissible application . . . ." *Id.*, at 630 (BRENNAN, J., dissenting). Instead, "[i]n a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." *Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 494 (1982);

[6] The city also claims that the Court of Appeals engaged in improper factfinding. The city notes that the District Court found that the ordinance had not been unconstitutionally applied, and argues that the Court of Appeals erred in reviewing Hill's evidence and concluding that it showed a potential for unconstitutional application. Such a conclusion was foreclosed, according to the city, by the "clearly erroneous" standard of Federal Rule of Civil Procedure 52(a). Brief for Appellant 40.

This argument is without merit. An independent review of the record is appropriate where the activity in question is arguably protected by the Constitution. *NAACP* v. *Claiborne Hardware Co.*, 458 U. S. 886, 915–916, n. 50 (1982). Moreover, the Court of Appeals *accepted* as "not challenged on appeal" the District Court's finding that the ordinance had not been unconstitutionally applied to Hill or to the reporters, 789 F. 2d, at 1107, 1110. The disagreement between the lower courts was therefore limited to a question of law—whether the ordinance on its face was substantially overbroad. In concluding that the ordinance was overbroad, the Court of Appeals did not err in reviewing evidence ignored by the District Court concerning the application of the ordinance, and in concluding that this evidence demonstrated a significant *potential* for unconstitutional application of the ordinance.

The question whether the ordinance has been unconstitutionally applied to Hill is neither presented by this appeal nor essential to our decision, and we do not address it.

*Kolender* v. *Lawson*, 461 U. S. 352, 359, n. 8 (1983). Criminal statutes must be scrutinized with particular care, *e. g.*, *Winters* v. *New York*, 333 U. S. 507, 515 (1948); those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application. *E. g.*, *Kolender*, *supra*, at 359, n. 8.

The city's principal argument is that the ordinance does not inhibit the exposition of ideas, and that it bans "core criminal conduct" not protected by the First Amendment. Brief for Appellant 12. In its view, the application of the ordinance to Hill illustrates that the police employ it only to prohibit such conduct, and not "as a subterfuge to control or dissuade free expression." *Ibid.* Since the ordinance is "content-neutral," and since there is no evidence that the city has applied the ordinance to chill particular speakers or ideas, the city concludes that the ordinance is not substantially overbroad.[7]

[7] The city's threshold argument that Hill lacks standing is without merit. The basis for the argument is the District Court's finding that the ordinance has been constitutionally applied to Hill in the past. This finding is irrelevant, however, to the question of Hill's standing to seek prospective relief. Hill has shown "a genuine threat of enforcement" of the ordinance against his future activities, *Steffel* v. *Thompson*, 415 U. S. 452, 475 (1974). Compare, *e. g.*, n. 1, *supra* (testimony of Hill's willingness to interrupt officers in the future), with *Golden* v. *Zwickler*, 394 U. S. 103 (1969) (intervening event rendered unlikely any future application of statute to appellee); see also App. to Juris. Statement B–3, n. 1 (District Court finding that Hill "is a gay rights activist who claims that the Houston police have 'systematically' harassed him 'as the direct result' of his sexual preferences"). Moreover, although we have never required that a plaintiff "undergo a criminal prosecution" to obtain standing to challenge the facial validity of a statute, *Doe* v. *Bolton*, 410 U. S. 179, 188 (1973), the fact that Hill has already been arrested four times under the ordinance lends compelling support to the threat of future enforcement. We therefore agree with the Court of Appeals that "Hill's record of arrests under the ordinance and his adopted role as citizen provocateur" give Hill standing to challenge the facial validity of the ordinance. 789 F. 2d, at 1107. Cf. *Ellis* v. *Dyson*, 421 U. S. 426 (1975).

We disagree with the city's characterization for several reasons. First, the enforceable portion of the ordinance deals not with core criminal conduct, but with speech. As the city has conceded, the language in the ordinance making it unlawful for any person to "assault" or "strike" a police officer is pre-empted by the Texas Penal Code. Reply Brief for Appellant 10. The city explains, *ibid.*, that "any species of physical assault on a police officer is encompassed within the provisions [§§ 22.01, 22.02] of the Texas Penal Code,"[8] and under § 1.08 of the Code, "[n]o governmental subdivision or agency may enact or enforce a law that makes any conduct covered by this code an offense subject to a criminal penalty."

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[8] One who assaults or strikes either a police officer or "any person summoned to aid in making the arrest" may be arrested and prosecuted either under Tex. Penal Code Ann. § 22.01 (1974 and Supp. 1987), which renders unlawful any provocative contact with (or assault or threatened assault against) any person, or under Tex. Penal Code Ann. § 22.02 (1974), which renders unlawful conduct causing bodily injury to a peace officer. These sections provide in pertinent part:

"Section 22.01. Assault.

"(a) A person commits an offense if the person:

"(1) intentionally, knowingly, or recklessly causes bodily injury to another including the person's spouse; or

"(2) intentionally or knowingly threatens another with imminent bodily injury including the person's spouse; or

"(3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative."

"Section 22.02. Aggravated Assault.

"(a) A person commits an offense if he commits assault as defined in Section 22.01 of this code and he:

"(1) causes serious bodily injury to another;

"(2) causes bodily injury to a peace officer in the lawful discharge of official duty when he knows or has been informed the person is a peace officer; or

"(3) uses a deadly weapon.

"(b) The actor is presumed to have known the person assaulted was a peace officer if he was wearing a distinctive uniform indicating his employment as a peace officer."

Tex. Penal Code Ann. § 1.08 (1974). See *Knott* v. *State*, 648 S. W. 2d 20 (Tex. App. 1983) (reversing conviction obtained under municipal ordinance pre-empted by state penal code). Accordingly, the enforceable portion of the ordinance makes it "unlawful for any person to . . . in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty," and thereby prohibits verbal interruptions of police officers.[9]

Second, contrary to the city's contention, the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers. "Speech is often provocative and challenging. . . . [But it] is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." *Terminiello* v. *Chicago*, 337 U. S. 1, 4 (1949). In *Lewis* v. *City of New Orleans*, 415 U. S. 130 (1974), for example, the appellant was found to have yelled obscenities and threats at an officer who had asked appellant's husband to produce his driver's license. Appellant was convicted under a municipal ordinance that made it a crime "'for any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty.'" *Id.*, at 132 (citation omitted). We vacated the conviction and invalidated the ordinance as facially overbroad. Critical to our decision was the fact that the ordinance "punishe[d] only spoken words" and was not limited in scope to fighting words that "'by their very utterance

[9] It is this portion of the ordinance to which Hill directed his constitutional challenge, see ¶¶ 6 and 27 of his complaint. Record 138, 144–145.

The Court of Appeals did not address the pre-emption issue; it assumed that the ordinance prohibited physical as well as verbal assaults, and still found the ordinance substantially overbroad. 789 F. 2d, at 1109. Because the city conceded pre-emption in this Court, see Reply Brief for Appellant 10, we need not address the question whether the ordinance, if not partially pre-empted, would be substantially overbroad.

inflict injury or tend to incite an immediate breach of the peace.'" *Id.*, at 133, quoting *Gooding* v. *Wilson*, 405 U. S. 518, 525 (1972); see also *ibid.* (Georgia breach-of-peace statute not limited to fighting words held facially invalid). Moreover, in a concurring opinion in *Lewis*, JUSTICE POWELL suggested that even the "fighting words" exception recognized in *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942), might require a narrower application in cases involving words addressed to a police officer, because "a properly trained officer may reasonably be expected to 'exercise a higher degree of restraint' than the average citizen, and thus be less likely to respond belligerently to 'fighting words.'" 415 U. S., at 135 (citation omitted).

The Houston ordinance is much more sweeping than the municipal ordinance struck down in *Lewis*. It is not limited to fighting words nor even to obscene or opprobrious language, but prohibits speech that "in any manner . . . interrupt[s]" an officer.[10] The Constitution does not allow such speech to be made a crime.[11] The freedom of individuals ver-

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[10] To the extent the ordinance could be interpreted to ban fighting words, it is pre-empted by Tex. Penal Code Ann. § 1.08 (1974), which pre-empts municipal laws that prohibit conduct subject to penalty under the Code, see *supra*, at 460–461, and by § 42.01, the State's comprehensive disorderly conduct provision. Subsection § 42.01(a)(1), which makes unlawful "abusive, indecent, profane or vulgar language" only if "by its very utterance [it] tends to incite an immediate breach of the peace," prohibits the use of fighting words. The "practice commentary" in the annotated Code confirms that this section is designed to track the "fighting words" exception set forth in *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942). Tex. Penal Code Ann. § 42.01, pp. 124–125 (1974 and Supp. 1987).

[11] JUSTICE POWELL suggests that our analysis of protected speech sweeps too broadly. But if some constitutionally unprotected speech must go unpunished, that is a price worth paying to preserve the vitality of the First Amendment. "'[I]f absolute assurance of tranquility is required, we may as well forget about free speech. Under such a requirement, the only "free" speech would consist of platitudes. That kind of speech does not

bally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.[12]

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need constitutional protection.'" *Spence* v. *Washington*, 418 U. S. 405, 416 (1974) (Douglas, J., concurring) (citation omitted).

In any case, today's decision does not leave municipalities powerless to punish physical obstruction of police action. For example, JUSTICE POWELL states that "a municipality constitutionally may punish an individual who chooses to stand near a police officer and persistently attempt to engage the officer in conversation while the officer is directing traffic at a busy intersection." *Post*, at 479. We agree, however, that such conduct might constitutionally be punished under a properly tailored statute, such as a disorderly conduct statute that makes it unlawful to fail to disperse in response to a valid police order or to create a traffic hazard. *E. g.*, *Colten* v. *Kentucky*, 407 U. S. 104 (1972). What a municipality may not do, however, and what Houston has done in this case, is to attempt to punish such conduct by broadly criminalizing speech directed to an officer—in this case, by authorizing the police to arrest a person who in *any* manner verbally interrupts an officer.

JUSTICE POWELL also observes that "contentious and abusive" speech can interrupt an officer's investigation, and offers as an example a person who "run[s] beside [an officer pursuing a felon] in a public street shouting at the officer." *Post*, at 479. But what is of concern in that example is not simply contentious speech, but rather the possibility that by shouting and running beside the officer the person may physically obstruct the officer's investigation. Although that person might constitutionally be punished under a tailored statute that prohibited individuals from physically obstructing an officer's investigation, he or she may not be punished under a broad statute aimed at speech.

[12] This conclusion finds a familiar echo in the common law. See, *e. g.*, *The King* v. *Cook*, 11 Can. Crim. Cas. Ann. 32, 33 (B. C. County Ct. 1906) ("Cook . . . a troublesome, talkative individual, who evidently regards the police with disfavour and makes no secret of his opinions on the subject . . . [told] some persons in a tone of voice undoubtedly intended for [the officer's] ears, that the arrested man was not drunk and the arrest was unjustifiable. Now up to this point he had committed no crime, as in a free country like this citizens are entitled to express their opinions without thereby rendering themselves liable to arrest unless they are inciting others to break the law; and policemen are not exempt from criticism any more than Cabinet Ministers"); *Levy* v. *Edwards*, 1 Car. & P. 40, 171

The city argues, however, that even if the ordinance encompasses some protected speech, its sweeping nature is both inevitable and essential to maintain public order. The city recalls this Court's observation in *Smith* v. *Goguen*, 415 U. S. 566, 581 (1974):

> "There are areas of human conduct where, by the nature of the problems presented, legislatures simply cannot establish standards with great precision. Control of the broad range of disorderly conduct that may inhibit a policeman in the performance of his official duties may be one such area requiring as it does an on-the-spot assessment of the need to keep order."

The city further suggests that its ordinance is comparable to the disorderly conduct statute upheld against a facial challenge in *Colten* v. *Kentucky*, 407 U. S. 104 (1972).

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Eng. Rep. 1094 (Nisi Prius 1823) (where constable breaks up fight between two boys and proceeds to handcuff one of them, third party who objects by telling constable "'you have no right to handcuff the boy'" has done no wrong and may not be arrested); cf. *Ruthenbeck* v. *First Criminal Judicial Court of Bergen Cty.*, 7 N. J. Misc. 969, 147 A. 625 (1929) (vacating conviction for saying to police officer "You big muttonhead, do you think you are a czar around here?"). See generally Note, Obstructing A Public Officer, 108 U. Pa. L. Rev. 388, 390–392, 406–407 (1960) ("[C]onduct involving only verbal challenge of an officer's authority or criticism of his actions . . . operates, of course, to impair the working efficiency of government agents. . . . Yet the countervailing danger that would lie in the stifling of all individual power to resist—the danger of an omnipotent, unquestionable officialdom—demands some sacrifice of efficiency . . . to the forces of private opposition. . . . [T]he strongest case for allowing challenge is simply the imponderable risk of abuse—to what extent realized it would never be possible to ascertain—that lies in the state in which no challenge is allowed").

The freedom verbally to challenge police action is not without limits, of course; we have recognized that "fighting words" which "by their very utterance inflict injury or tend to incite an immediate breach of the peace" are not constitutionally protected. *Chaplinsky* v. *New Hampshire*, *supra*, at 572; *Gooding* v. *Wilson*, 405 U. S. 518, 522–525 (1972). See also *supra*, at 461–462, and n. 10.

This Houston ordinance, however, is not narrowly tailored to prohibit only disorderly conduct or fighting words,[13] and in no way resembles the law upheld in *Colten*.[14] Although we appreciate the difficulties of drafting precise laws, we have repeatedly invalidated laws that provide the police with unfettered discretion to arrest individuals for words or conduct that annoy or offend them.[15] As the Court observed over a

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[13] To the extent the ordinance did extend to disorderly conduct, it would be pre-empted by Tex. Penal Code Ann. § 42.01 (1974 and Supp. 1987), the comprehensive state disorderly conduct provision. See n. 10, *supra*.

[14] The ordinance challenged in *Colten* v. *Kentucky* stated:

"(1) A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance, or alarm, or recklessly creating a risk thereof, he:

. . . . . .

"(f) Congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse . . . ." Ky. Rev. Stat. § 437.016(1)(f) (Supp. 1968); see 407 U. S., at 108.

The Court upheld the ordinance against overbreadth challenge because the Kentucky Supreme Court had construed it so that it "infringe[d] no protected speech or conduct." *Id.*, at 111.

[15] See, *e. g.*, *Kolender* v. *Lawson*, 461 U. S. 352, 360–361 (1983) (identification requirement unconstitutional because it accords police "full discretion"); *Smith* v. *Goguen*, 415 U. S. 566, 575 (1974) ("Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections . . . [thereby] entrusting lawmaking 'to the moment-to-moment judgment of the policeman on his beat' "), quoting *Gregory* v. *Chicago*, 394 U. S. 111, 120 (1969) (Black, J., concurring); *Papachristou* v. *City of Jacksonville*, 405 U. S. 156, 170 (1972) (vagrancy ordinance "furnishes a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure' "), quoting *Thornhill* v. *Alabama*, 310 U. S. 88, 97–98 (1940); *Coates* v. *Cincinnati*, 402 U. S. 611, 615–616 (1971) (statute prohibiting "annoying" conduct "contains an obvious invitation to discriminatory enforcement"). Like many of the ordinances in these cases, Houston's effectively grants police the discretion to make arrests selectively on the basis of the content of the speech. Such discretion is particularly repugnant given "[t]he eternal temptation . . . to arrest the speaker rather than to correct the conditions about which he complains." *Younger* v. *Harris*, 401 U. S. 37, 65 (1971) (Douglas, J., dissenting).

century ago, "[i]t would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." *United States* v. *Reese*, 92 U. S. 214, 221 (1876). In *Lewis*, JUSTICE POWELL elaborated the basis for our concern with such sweeping, dragnet laws:

> "This ordinance, as construed by the Louisiana Supreme Court, confers on police a virtually unrestrained power to arrest and charge persons with a violation. Many arrests are made in 'one-on-one' situations where the only witnesses are the arresting officer and the person charged. All that is required for conviction is that the court accept the testimony of the officer that obscene or opprobrious language had been used toward him while in the performance of his duties.*. . .
>
> "Contrary to the city's argument, it is unlikely that limiting the ordinance's application to genuine 'fighting words' would be incompatible with the full and adequate performance of an officer's duties. . . . [I]t is usually unnecessary [to charge a person] with the less serious offense of addressing obscene words to the officer. The present type of ordinance tends to be invoked only where there is no other valid basis for arresting an objectionable or suspicious person. The opportunity for abuse, especially where a statute has received a virtually open-ended interpretation, is self-evident.
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> " *The facts in this case, and particularly the direct conflict of testimony as to 'who said what,' well illustrate the possibility of abuse."

415 U. S., at 135–136, and n.

Houston's ordinance criminalizes a substantial amount of constitutionally protected speech, and accords the police unconstitutional discretion in enforcement. The ordinance's plain language is admittedly violated scores of times daily, App. 77, yet only some individuals—those chosen by the po-

lice in their unguided discretion—are arrested. Far from providing the "breathing space" that "First Amendment freedoms need . . . to survive," *NAACP* v. *Button*, 371 U. S. 415, 433 (1963), the ordinance is susceptible of regular application to protected expression. We conclude that the ordinance is substantially overbroad, and that the Court of Appeals did not err in holding it facially invalid.

## III

The city has also urged us not to reach the merits of Hill's constitutional challenge, but rather to abstain for reasons related to those underlying our decision in *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496 (1941). In its view, there are certain limiting constructions readily available to the state courts that would eliminate the ordinance's overbreadth.[16]

Abstention is, of course, the exception and not the rule, *Colorado River Water Conservation Dist.* v. *United States*, 424 U. S. 800, 813 (1976), and we have been particularly reluctant to abstain in cases involving facial challenges based on the First Amendent.[17] We have held that "abstention . . . is inappropriate for cases [where] . . . statutes are justifiably attacked on their face as abridging free expression." *Dombrowski* v. *Pfister*, 380 U. S. 479, 489–490 (1965). "In such case[s] to force the plaintiff who has commenced a federal ac-

[16] The city did not raise the abstention issue until after it had lost on the merits before the panel of the Court of Appeals. After rehearing en banc, neither the majority nor the dissent addressed abstention. The city's tardy decision to urge abstention is remarkable given its acquiescence for more than three years to federal adjudication of the merits and its insistence before the District Court and the panel that the ordinance was both unambiguous and constitutional on its face. These circumstances undercut the force of the city's argument, but do not bar us from considering it. *Wisconsin* v. *Constantineau*, 400 U. S. 433 (1971); *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496 (1941).

[17] See *Dombrowski* v. *Pfister*, 380 U. S. 479, 486–487 (1965); *Procunier* v. *Martinez*, 416 U. S. 396, 404 (1974); *Baggett* v. *Bullitt*, 377 U. S. 360, 378–379 (1964); *NAACP* v. *Button*, 371 U. S. 415, 433 (1963); but cf. *Babbitt* v. *Farm Workers*, 442 U. S. 289 (1979).

tion to suffer the delay of state-court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect." *Zwickler* v. *Koota*, 389 U. S. 241, 252 (1967).

Even if this case did not involve a facial challenge under the First Amendment, we would find abstention inappropriate. In cases involving a facial challenge to a statute, the pivotal question in determining whether abstention is appropriate is whether the statute is "fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question." *Harman* v. *Forssenius*, 380 U. S. 528, 534–535 (1965); see also *Hawaii Housing Authority* v. *Midkiff*, 467 U. S. 229, 236 (1984) (same). If the statute is not obviously susceptible of a limiting construction, then even if the statute has "never [been] interpreted by a state tribunal . . . it is the duty of the federal court to exercise its properly invoked jurisdiction." *Harman*, *supra*, at 535; see, *e. g.*, *Wisconsin* v. *Constantineau*, 400 U. S. 433, 439 (1971) ("Where there is no ambiguity in the state statute, the federal court should not abstain but should proceed to decide the federal constitutional claim"); *Zwickler* v. *Koota*, *supra*, at 250–251, and n. 14 (citing cases).

This ordinance is not susceptible to a limiting construction because, as both courts below agreed, its language is plain and its meaning unambiguous. Its constitutionality cannot "turn upon a choice between one or several alternative meanings." *Baggett* v. *Bullitt*, 377 U. S. 360, 378 (1964); cf. *Babbitt* v. *Farm Workers*, 442 U. S. 289, 308 (1979). Nor can the ordinance be limited by severing discrete unconstitutional subsections from the rest. For example, it cannot be limited to "core criminal conduct" such as physical assaults or fighting words because those applications are pre-empted by state law. See *supra*, at 460–461, and n. 10. The enforceable portion of this ordinance is a general prohibition of speech that "simply has no core" of constitutionally unprotected expression to which it might be limited. *Smith* v.

*Goguen*, 415 U. S., at 578 (emphasis deleted). The city's proposed constructions are insufficient,[18] and it is doubtful that even "a remarkable job of plastic surgery upon the face of the ordinance" could save it. *Shuttlesworth* v. *Birmingham*, 394 U. S. 147, 153 (1969). In sum, "[s]ince 'the naked question, uncomplicated by [ambiguous language], is whether the Act on its face is unconstitutional,' *Wisconsin* v. *Constantineau*, 400 U. S. 433, 439 (1971), abstention from federal jurisdiction is not required." *Hawaii Housing Authority*, *supra*, at 237.

The city relies heavily on its claim that the state courts have not had an opportunity to construe the statute. Even if true, that factor would not in itself be controlling. As stated above, when a statute is not ambiguous, there is no need to abstain even if state courts have never interpreted the statute. *Harman*, *supra*, at 534. For example, we have declined to abstain from deciding a facial challenge to a state statute when the suit was filed in federal court just four days after the statute took effect. *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491 (1985). But in any event, the city's claim that state courts have not had an opportunity to construe the statute is misleading. Only the state *appellate* courts appear to have lacked this opportunity. It is undisputed that Houston's Municipal Courts, which have been courts of

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[18] The city suggests that the statute would be constitutional if construed to apply only to (1) intentional interruptions by (2) "physical, rather than verbal, acts" during (3) an officer's attempts to make "arrests and detentions." Brief for Appellant 30–31. These proposals are either at odds with the ordinance's plain meaning, or do not sufficiently limit its scope. First, speech does not necessarily lose its constitutional protection because the speaker intends it to interrupt an officer, nor would an intent requirement cabin the excessive discretion the ordinance provides to officers. Second, given the pre-emption of the first part of the statute, discussed *infra*, limiting the ordinance to "physical acts" would be equivalent to invalidating it on its face. Third, there is no reasonable way to read the plain language of the ordinance as limited to arrests and detentions; even if there were, such a limitation would not significantly limit its scope.

record in Texas since 1976, have had numerous opportunities to narrow the scope of the ordinance.[19] There is no evidence that they have done so.[20] In fact, the city's primary position throughout this litigation has been "to insis[t] on the validity of the ordinance as literally read." 789 F. 2d, at 1107. We have long recognized that trial court interpretations, such as those given in jury instructions, constitute "a ruling on a question of state law that is as binding on us as though the precise words had been written into the ordinance." *Terminiello*, 337 U. S., at 4. Thus, where municipal courts have regularly applied an unambiguous statute, there is certainly no need for a federal court to abstain until state appellate courts have an opportunity to construe it.

The possibility of certification does not change our analysis.[21] The certification procedure is useful in reducing the substantial burdens of cost and delay that abstention places on litigants. Where there is an uncertain question of state law that would affect the resolution of the federal claim, and where delay and expense are the chief drawbacks to abstention, the availability of certification becomes an important factor in deciding whether to abstain. *E. g.*, *Bellotti* v. *Baird*, 428 U. S. 132 (1976). Nevertheless, even where we have recognized the importance of certification in deciding whether to abstain, we have been careful to note that the

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[19] The ordinance has been in force, in substantially the same language, for over 30 years. 789 F. 2d, at 1111. The Houston police arrest on average 1,000 persons per year under the ordinance. Brief for Appellee 14, 35 (citing Record).

[20] Indeed, Hill introduced evidence in the District Court that Houston's Municipal Courts have declined to employ limiting constructions in jury instructions. Brief for Appellee 35 (citing Record 104–105, plaintiff's Exhibits 3, 4, 5).

[21] Under Texas law, either this Court or a United States court of appeals may certify a question of Texas criminal law "which may be determinative of the cause then pending and as to which it appears to the certifying court that there is no controlling precedent in the decisions of the Court of Criminal Appeals." Tex. Rule App. Proc. 214.

availability of certification is not in itself sufficient to render abstention appropriate. *Id.*, at 151. It would be manifestly inappropriate to certify a question in a case where, as here, there is no uncertain question of state law whose resolution might affect the pending federal claim. As we have demonstrated, *supra*, at 468–469, this ordinance is neither ambiguous nor obviously susceptible of a limiting construction.[22] A federal court may not properly ask a state court if it would care in effect to rewrite a statute.[23] We therefore see no need in this case to abstain pending certification.

## IV

Today's decision reflects the constitutional requirement that, in the face of verbal challenges to police action, officers and municipalities must respond with restraint. We are

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[22] JUSTICE POWELL argues that the unsettled question of the effect on this ordinance of § 6.02(b) of the Texas Penal Code, which requires "a culpable mental state" as an element of any offense, creates sufficient ambiguity to require certification. He suggests that the Texas Court of Criminal Appeals might limit convictions under the ordinance to cases in which there was a finding of "inten[t] to interfere with the officer's performance of his duties" justifies certification, and argues that such a limit would "narrow the focus of the constitutional question" before us. *Post*, at 474. As JUSTICE POWELL implicitly concedes, however, there is no possibility that such an intent requirement would eliminate the excessive discretion the ordinance affords to the police in choosing whom to arrest; even with such a requirement, the ordinance would remain unconstitutionally overbroad. Moreover, the meaning and application of such an intent requirement is not self-evident, and could raise independent questions of vagueness or of overbreadth. This is therefore a case where certification "would not only hold little hope of eliminating the issue of [overbreadth] but also would very likely pose other constitutional issues for decision, a result not serving the abstention- [or certification-]justifying end of avoiding constitutional adjudication." *Baggett* v. *Bullitt*, 377 U. S., at 378.

[23] It would also be inappropriate for a federal court to certify the entire constitutional challenge to the state court, of course, for certified questions should be confined to uncertain questions of state law. See 17 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4248, pp. 529–530 (1978).

mindful that the preservation of liberty depends in part upon the maintenance of social order. Cf. *Terminiello* v. *Chicago*, *supra*, at 37 (dissenting opinion). But the First Amendment recognizes, wisely we think, that a certain amount of expressive disorder not only is inevitable in a society committed to individual freedom, but must itself be protected if that freedom would survive. We therefore affirm the judgment of the Court of Appeals.

*It is so ordered.*

JUSTICE BLACKMUN, concurring.

I join the Court's opinion and its judgment except that I do not agree with any implication—if one exists—see *ante*, at 461–462, that *Gooding* v. *Wilson*, 405 U. S. 518 (1972), and *Lewis* v. *City of New Orleans*, 415 U. S. 130 (1974), are good law in the context of their facts, or that they lend any real support to the judgment under review in this case. I dissented in *Gooding* and *Lewis*, see 405 U. S., at 534, and 415 U. S., at 136, in the conviction that the legislation there under consideration was related to "fighting words," within the teaching and reach of *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942). I am still of that view, and I therefore disassociate myself from any possible suggestion that those cases are controlling authority here. The Houston ordinance before us, however, as is evident from its very language, and as the Court demonstrates, *ante*, at 462–463, 465, is far more broad and more offensive to First Amendment values and is susceptible of regular application to protected expression.

JUSTICE SCALIA, concurring in the judgment.

For the reasons stated by JUSTICE POWELL in Part II of his opinion, I agree that abstention would not be appropriate in this case. Because I do not believe that the Houston ordinance is reasonably susceptible of a limiting construction that would avoid the constitutional question posed in this case, I agree with the Court that certification would also be inappropriate. On the merits, I agree with the views expressed by

JUSTICE POWELL in Part III of his opinion. I therefore concur in the judgment and joins Parts II and III of JUSTICE POWELL's opinion.

JUSTICE POWELL, with whom JUSTICE O'CONNOR joins, and with whom THE CHIEF JUSTICE joins as to Parts I and II, and JUSTICE SCALIA joins as to Parts II and III, concurring in the judgment in part and dissenting in part.

The city of Houston has made it unlawful "for any person to . . . in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty." Code of Ordinances, City of Houston, Texas § 34–11(a) (1984). The Court today concludes that this ordinance violates the First and Fourteenth Amendments of the Constitution. In my view, the Court should not have reached the merits of the constitutional claims, but instead should have certified a question to the Texas Court of Criminal Appeals. I also disagree with the Court's reasons for declining to abstain under the principle of *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496 (1941). Finally, although I agree that the ordinance as interpreted by the Court violates the Fourteenth Amendment, I write separately because I cannot join the Court's reasoning.

I

This case involves a challenge to an ordinance designed to prevent interference with police officers in the performance of their duties. Constitutional analysis should not proceed until we determine the precise meaning of the ordinance in question. But this problem does not detain the Court, because it concludes that interpretation of the ordinance presents "no uncertain question of state law." *Ante*, at 471. On the contrary, I think there is a serious question as to the meaning of the ordinance.

The challenged ordinance does not contain an explicit intent requirement. Both parties acknowledge, however, that the Texas Penal Code requires imputation of some culpability requirement. See Brief for Appellant 28–30; Brief for Ap-

pellee 31. Texas Penal Code Ann. § 6.02(b) (1974) provides: "If the definition of an offense does not prescribe a culpable mental state, a culpable mental state is nevertheless required unless the definition plainly dispenses with any mental element."[1] The nature of this imputed mental state has a direct effect on the constitutional issue presented by this case. The Court apparently assumes that the requisite intent can be provided by a person's intent to utter words that constitute an interruption. But it would be plausible for the Texas Court of Criminal Appeals to construe the intent requirement differently. For example, that court could conclude that conviction under the ordinance requires proof that the person not only intended to speak, but also intended to interfere with the officer's performance of his duties.

This interpretation would change the constitutional questions in two ways: it would narrow substantially the scope of the ordinance, and possibly resolve the overbreadth question; it also would make the language of the ordinance more precise, and possibly satisfy the concern as to vagueness. At the least, such an interpretation would narrow the focus of the constitutional question and obviate the need for the Court's broad statements regarding First Amendment protections of speech directed at police officers. It is not this Court's role, however, to place an interpretive gloss on the words the Houston City Council has chosen. The ordinance is not a federal law, and we do not have the power "'authoritatively to construe'" it. *Gooding* v. *Wilson*, 405 U. S. 518, 520 (1972) (quoting *United States* v. *Thirty-seven Photographs*, 402 U. S. 363, 369 (1971)).

But we are not without means of obtaining an authoritative construction. Last year the Texas voters amended the Texas Constitution to provide that the "court of criminal ap-

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[1] At least one Texas appellate court has concluded that this section applies to municipal ordinances. See *Pollard* v. *State*, 687 S. W. 2d 373, 374 (Tex. App. 1985) (pet. ref'd, *Pollard* v. *State*, No. 05–83–01161 Cr. (Jan. 29, 1986)).

peals [has] jurisdiction to answer questions of state law certified from a federal appellate court." Tex. Const., Art. 5, § 3–c. See Tex. Rule App. Proc. 214 (implementing this aspect of the constitutional provision). As JUSTICE O'CONNOR explained recently, "[s]peculation by a federal court about the meaning of a state statute in the absence of prior state court adjudication is particularly gratuitous when . . . the state courts stand willing to address questions of state law on certification from a federal court." *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 510 (1985) (concurring). The Court repeatedly has emphasized the appropriateness of certification in cases presenting uncertain questions of state law. In such cases, certification can "'save time, energy, and resources and hel[p] build a cooperative judicial federalism.'" *Bellotti* v. *Baird*, 428 U. S. 132, 150–151 (1976) (quoting *Lehman Brothers* v. *Schein*, 416 U. S. 386, 391 (1974)).[2]

In my view, the ambiguity of the ordinance, coupled with the seriousness of invalidating a state law, requires that we ascertain what the ordinance means before we address appellee's constitutional claims. I therefore would vacate the judgment below and remand with instructions to certify the case to the Texas Court of Criminal Appeals to allow it to interpret the intent requirement of this ordinance. Accordingly, I dissent.

The Court concludes, however, that the case properly is before us, and so I address the remaining issues presented.[3]

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[2] This case demonstrates two advantages of certification over the more traditional *Pullman* abstention procedure. First, certification saves time by sending the question directly to the court that is empowered to provide an authoritative construction of the statute. Second, certification obviates the procedural difficulties that may hinder efforts to obtain declaratory judgments from state trial courts. See *infra*, at 476–477.

[3] Cf. *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 374 (1962) (Harlan, J., dissenting in part and concurring in part); *Gillespie* v. *United States Steel Corp.*, 379 U. S. 148, 170 (1964) (Stewart, J., concurring). See also *Longshoremen* v. *Davis*, 476 U. S. 380, 403 (1986) (REHNQUIST, J., concurring in part and concurring in judgment).

## II

*Pullman* abstention generally is appropriate when determination of an unsettled question of state law by a state court could avoid the need for decision of a substantial question of federal constitutional law. Although I agree with the Court that *Pullman* abstention is inappropriate in this case, I write separately because my reasons are somewhat different from those expressed by the Court.[4]

*Pullman* abstention is inappropriate unless the state courts "provid[e] the parties with adequate means to adjudicate the controverted state law issue." Field, Abstention in Constitutional Cases: The Scope of the *Pullman* Abstention Doctrine, 122 U. Pa. L. Rev. 1071, 1144 (1974). See 17 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4242, p. 468 (1978). Cf. *Railroad Comm'n* v. *Pullman Co.*, 312 U. S., at 501 (abstaining because the "law of Texas appears to furnish easy and ample means for determin-

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[4] The Court concludes that *Pullman* abstention is inappropriate for two reasons. First, it suggests that this Court should be "particularly reluctant to abstain in cases involving facial challenges based on the First Amendment." *Ante*, at 467. The Court supports this conclusion with a citation to *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965). I see nothing in that case that supports such a broad principle. The *Dombrowski* Court declined to abstain because "the interpretation ultimately put on the [challenged state] statutes by the state courts is irrelevant," *id.*, at 490, and because "no readily apparent construction suggest[ed] itself as a vehicle" for curing the constitutional problem with the statute, *id.*, at 491. Both of these rationales are straightforward applications of the general rule that *Pullman* abstention is appropriate only when determination of an uncertain question of state law would obviate the need for the federal court to decide a substantial question of federal constitutional law.

The Court's second reason for not abstaining is that it believes the statute is not "'fairly subject to an interpretation which will . . . substantially modify the federal constitutional question.'" *Ante*, at 468 (quoting *Harman* v. *Forssenius*, 380 U. S. 528, 534–535 (1965)). See *supra*, at 473–474, for my disagreement with this view.

ing the Commission's authority").[5] It is not clear that Texas law affords a remedy by which Hill could obtain a state court interpretation of the ordinance. The only apparent means of securing such a ruling would be through an action for a declaratory judgment. See Tex. Civ. Prac. & Rem. Code Ann. § 37.001 *et seq.* (1986) (authorizing courts to grant declaratory judgments). But Texas law treats declaratory judgment actions as civil cases. Thus, they are appealable to the Texas Supreme Court rather than the Texas Court of Criminal Appeals. See, *e. g.*, *United Services Life Ins. Co.* v. *Delaney*, 396 S. W. 2d 855 (Tex. 1965). Moreover, because the Texas Court of Criminal Appeals has exclusive appellate jurisdiction to decide questions of Texas criminal law, see Tex. Const., Art. V, § 5, the Texas Supreme Court has held, with narrow exceptions, that injunctive or declaratory relief against criminal statutes is not available in civil cases. See *Texas Liquor Control Board* v. *Canyon Creek Land Corp.*, 456 S. W. 2d 891, 894–896 (Tex. 1970). Thus, it is quite unlikely that a declaratory or injunctive action would bring Hill any determination of the meaning of the ordinance—either from a trial or an appellate court. In short, the only sure ways for the ordinance to be interpreted are by certification, see *supra*, at 473–475, and by appeals of criminal convictions under the ordinance. Neither of these routes provides Hill a means to obtain relief sufficient to justify *Pullman* abstention.

Aside from the barriers created by Texas procedure, the late stage at which the city of Houston raised this issue weighs heavily against abstention. Houston first suggested that abstention was appropriate after the Court of Appeals published its panel opinion invalidating the ordinance. As

[5] I note that the adequacy of state procedures is examined much more strictly in cases seeking *Pullman* abstention than in cases seeking *Younger* abstention. Compare, *e. g.*, *Pennzoil Co.* v. *Texaco Inc.*, 481 U. S. 1, 14–17 (1987).

we have noted in a similar case, "[t]his proposal comes nearly three years after the filing of the complaint and would produce delay attributable to abstention that the Court in recent years has sought to minimize." See *Mayor of Philadelphia* v. *Education Equality League*, 415 U. S. 605, 628 (1974). In sum, the late presentation of this claim, coupled with the doubts as to whether relief could be secured under Texas law, convinces me that *Pullman* abstention is inappropriate here.

III

I agree with the Court's conclusion that the ordinance violates the Fourteenth Amendment, but do not join the Court's reasoning.

A

The Court finds that the ordinance "deals not with core criminal conduct, but with speech." *Ante*, at 460. This view of the ordinance draws a distinction where none exists. The terms of the ordinance—"oppose, molest, abuse or interrupt any policeman in the execution of his duty"—include general words that can apply as fully to conduct as to speech. It is in this respect that *Lewis* v. *City of New Orleans*, 415 U. S. 130 (1974), is clearly distinguishable. In that case the New Orleans ordinance made it a breach of the peace for:

> "'any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty.'" *Id.*, at 132 (quoting New Orleans Ordinance 828 M. C. S. § 49–7).

On its face, the New Orleans ordinance criminalizes only the use of language. JUSTICE BRENNAN, speaking for the Court in *Lewis*, explicitly noted this, stating that the ordinance "punishe[d] only spoken words." *Id.*, at 134. By contrast, the ordinance presented in this case could be applied to activity that involves no element of speech or communication. For example, the ordinance evidently would punish individ-

uals who—without saying a single word—obstructed an officer's access to the scene of an ongoing public disturbance, or indeed the scene of a crime. Accordingly, I cannot agree with the Court that this ordinance punishes only speech.

I do agree that the ordinance can be applied to speech in some cases. And I also agree that the First Amendment protects a good deal of speech that may be directed at police officers. On occasion this may include verbal criticism, but I question the implication of the Court's opinion that the First Amendment generally protects verbal "challenge[s] directed at police officers," *ante*, at 461. A "challenge" often takes the form of opposition or interruption of performance of duty.[6] In many situations, speech of this type directed at police officers will be functionally indistinguishable from conduct that the First Amendment clearly does not protect. For example, I have no doubt that a municipality constitutionally may punish an individual who chooses to stand near a police officer and persistently attempt to engage the officer in conversation while the officer is directing traffic at a busy intersection. Similarly, an individual, by contentious and abusive speech, could interrupt an officer's investigation of possible criminal conduct. A person observing an officer pursuing a person suspected of a felony could run beside him in a public street shouting at the officer. Similar tactics could interrupt a policeman lawfully attempting to interrogate persons believed to be witnesses to a crime.

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[6] The first definition of "challenge" in the 1980 edition of the American Heritage Dictionary is "[a] call to engage in a contest or fight." The Court implies that municipalities can punish an attempt to interfere with police officers only if it "physically obstruct[s] the officer's investigation," *ante*, at 463, n. 11, or if it constitutes "fighting words" within the meaning of *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942), see *ante*, at 464, n. 12. This implication troubles me because, as I have indicated in the text *supra* this page, there can be many situations where a State—in the public interest—should have the right to punish speech directed at police officers that does not fall within either of these exceptions.

In sum, the Court's opinion appears to reflect a failure to apprehend that this ordinance—however it may be construed—is intended primarily to further the public's interest in law enforcement. To be sure, there is a fine line between legitimate criticism of police and the type of criticism that interferes with the very purpose of having police officers. But the Court unfortunately seems to ignore this fine line and to extend First Amendment protection to any type of verbal molestation or interruption of an officer in the performance of his duty.

B

Despite the concerns expressed above, I nevertheless agree that the ambiguous terms of this ordinance "confe[r] on police a virtually unrestrained power to arrest and charge persons with a violation. . . . The opportunity for abuse, especially where a statute has received a virtually open-ended interpretation, is self-evident." *Lewis* v. *City of New Orleans*, *supra*, at 135–136 (POWELL, J., concurring in result). No Texas court has placed a limiting construction on the ordinance. Also, it is clear that Houston has made no effort to curtail the wide discretion of police officers under the present ordinance. The record contains a sampling of complaints filed under the ordinance in 1981 and 1982. People have been charged with such crimes as "Failure to remain silent and stationary," "Remaining," "Refusing to remain silent," and "Talking." 789 F. 2d 1103, 1113–1114 (CA5 1986) (en banc). Although some of these incidents may have involved unprotected conduct, the vagueness of these charges suggests that, with respect to this ordinance, Houston officials have not been acting with proper sensitivity to the constitutional rights of their citizens. When government protects society's interests in a manner that restricts some speech the law must be framed more precisely than the ordinance before us. Accordingly, I agree with the Court that the Houston ordinance is unconstitutional.

It is difficult, of course, specifically to frame an ordinance that applies in

> "areas of human conduct where, by the nature of the problems presented, legislatures simply cannot establish standards with great precision. Control of the broad range of disorderly conduct that may inhibit a policeman in the performance of his official duties may be one such area, requiring as it does an on-the-spot assessment of the need to keep order." *Smith* v. *Goguen*, 415 U. S. 566, 581 (1974).

In view of the difficulty of drafting precise language that never restrains speech and yet serves the public interest, the attempts of States and municipalities to draft laws of this type should be accorded some leeway. I am convinced, however, that the Houston ordinance is too vague to comport with the First and Fourteenth Amendments. As I explained *supra*, at 473–474, it should be possible for the present ordinance to be reframed in a way that would limit the present broad discretion of officers and at the same time protect substantially the city's legitimate interests. For example, the ordinance could make clear that it applies to speech only if the purpose of the speech were to interfere with the performance by a police officer of his lawful duties. In this situation, the difficulties of drafting precisely should not justify upholding this ordinance.

## IV

Although I believe that the proper course is for the Court to vacate the judgment of the Court of Appeals, I "bo[w] to the Court's decision that the case is properly before us," *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 374 (1962) (Harlan, J., concurring in part and dissenting in part), and concur in the judgment of affirmance.

CHIEF JUSTICE REHNQUIST, dissenting.

I join Parts I and II of JUSTICE POWELL's opinion concurring in the judgment in part and dissenting in part. I do not

agree, however, that the Houston ordinance, in the absence of an authoritative construction by the Texas courts, is unconstitutional. See *Lewis* v. *City of New Orleans*, 415 U. S. 130, 136 (1974) (BLACKMUN, J., dissenting). I therefore dissent from the Court's affirmance of the judgment of the Court of Appeals.

# HUSTLER MAGAZINE, INC., ET AL. *v.* FALWELL

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 86–1278. Argued December 2, 1987—Decided February 24, 1988

Respondent, a nationally known minister and commentator on politics and public affairs, filed a diversity action in Federal District Court against petitioners, a nationally circulated magazine and its publisher, to recover damages for, *inter alia*, libel and intentional infliction of emotional distress arising from the publication of an advertisement "parody" which, among other things, portrayed respondent as having engaged in a drunken incestuous rendezvous with his mother in an outhouse. The jury found against respondent on the libel claim, specifically finding that the parody could not "reasonably be understood as describing actual facts . . . or events," but ruled in his favor on the emotional distress claim, stating that he should be awarded compensatory and punitive damages. The Court of Appeals affirmed, rejecting petitioners' contention that the "actual malice" standard of *New York Times Co.* v. *Sullivan*, 376 U. S. 254, must be met before respondent can recover for emotional distress. Rejecting as irrelevant the contention that, because the jury found that the parody did not describe actual facts, the ad was an opinion protected by the First Amendment to the Federal Constitution, the court ruled that the issue was whether the ad's publication was sufficiently outrageous to constitute intentional infliction of emotional distress.

*Held:* In order to protect the free flow of ideas and opinions on matters of public interest and concern, the First and Fourteenth Amendments prohibit public figures and public officials from recovering damages for the tort of intentional infliction of emotional distress by reason of the publication of a caricature such as the ad parody at issue without showing in addition that the publication contains a false statement of fact which was made with "actual malice," *i. e.*, with knowledge that the statement was false or with reckless disregard as to whether or not it was true. The State's interest in protecting public figures from emotional distress is not sufficient to deny First Amendment protection to speech that is patently offensive and is intended to inflict emotional injury when that speech could not reasonably have been interpreted as stating actual facts about the public figure involved. Here, respondent is clearly a "public figure" for First Amendment purposes, and the lower courts' finding that the ad parody was not reasonably believable must be accepted. "Outrageous-

ness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression, and cannot, consistently with the First Amendment, form a basis for the award of damages for conduct such as that involved here. Pp. 50–57.

797 F. 2d 1270, reversed.

REHNQUIST, C. J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, STEVENS, O'CONNOR, and SCALIA, JJ., joined. WHITE, J., filed an opinion concurring in the judgment, *post,* p. 57. KENNEDY, J., took no part in the consideration or decision of the case.

*Alan L. Isaacman* argued the cause for petitioners. With him on the briefs was *David O. Carson.*

*Norman Roy Grutman* argued the cause for respondent. With him on the brief were *Jeffrey H. Daichman* and *Thomas V. Marino.**

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner Hustler Magazine, Inc., is a magazine of nationwide circulation. Respondent Jerry Falwell, a nationally known minister who has been active as a commentator on politics and public affairs, sued petitioner and its publisher, petitioner Larry Flynt, to recover damages for invasion of

*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union Foundation et al. by *Harriette K. Dorsen, John A. Powell,* and *Steven R. Shapiro;* for the Association of American Editorial Cartoonists et al. by *Roslyn A. Mazer* and *George Kaufmann;* for the Association of American Publishers, Inc., by *R. Bruce Rich;* for Home Box Office, Inc., by *P. Cameron DeVore* and *Daniel M. Waggoner;* for the Law & Humanities Institute by *Edward de Grazia;* for the Reporters Committee for Freedom of the Press et al. by *Jane E. Kirtley, Richard M. Schmidt, David Barr,* and *J. Laurent Scharff;* for Richmond Newspapers, Inc., et al. by *Alexander Wellford, David C. Kohler, Rodney A. Smolla, William A. Niese, Jeffrey S. Klein, W. Terry Maguire,* and *Slade R. Metcalf;* and for Volunteer Lawyers for the Arts, Inc., by *Irwin Karp* and *I. Fred Koenigsberg.*

privacy, libel, and intentional infliction of emotional distress. The District Court directed a verdict against respondent on the privacy claim, and submitted the other two claims to a jury. The jury found for petitioners on the defamation claim, but found for respondent on the claim for intentional infliction of emotional distress and awarded damages. We now consider whether this award is consistent with the First and Fourteenth Amendments of the United States Constitution.

The inside front cover of the November 1983 issue of Hustler Magazine featured a "parody" of an advertisement for Campari Liqueur that contained the name and picture of respondent and was entitled "Jerry Falwell talks about his first time." This parody was modeled after actual Campari ads that included interviews with various celebrities about their "first times." Although it was apparent by the end of each interview that this meant the first time they sampled Campari, the ads clearly played on the sexual double entendre of the general subject of "first times." Copying the form and layout of these Campari ads, Hustler's editors chose respondent as the featured celebrity and drafted an alleged "interview" with him in which he states that his "first time" was during a drunken incestuous rendezvous with his mother in an outhouse. The Hustler parody portrays respondent and his mother as drunk and immoral, and suggests that respondent is a hypocrite who preaches only when he is drunk. In small print at the bottom of the page, the ad contains the disclaimer, "ad parody—not to be taken seriously." The magazine's table of contents also lists the ad as "Fiction; Ad and Personality Parody."

Soon after the November issue of Hustler became available to the public, respondent brought this diversity action in the United States District Court for the Western District of Virginia against Hustler Magazine, Inc., Larry C. Flynt, and Flynt Distributing Co., Inc. Respondent stated in his complaint that publication of the ad parody in Hustler entitled

him to recover damages for libel, invasion of privacy, and intentional infliction of emotional distress. The case proceeded to trial.[1] At the close of the evidence, the District Court granted a directed verdict for petitioners on the invasion of privacy claim. The jury then found against respondent on the libel claim, specifically finding that the ad parody could not "reasonably be understood as describing actual facts about [respondent] or actual events in which [he] participated." App. to Pet. for Cert. C1. The jury ruled for respondent on the intentional infliction of emotional distress claim, however, and stated that he should be awarded $100,000 in compensatory damages, as well as $50,000 each in punitive damages from petitioners.[2] Petitioners' motion for judgment notwithstanding the verdict was denied.

On appeal, the United States Court of Appeals for the Fourth Circuit affirmed the judgment against petitioners. *Falwell* v. *Flynt*, 797 F. 2d 1270 (1986). The court rejected petitioners' argument that the "actual malice" standard of *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), must be met before respondent can recover for emotional distress. The court agreed that because respondent is concededly a public figure, petitioners are "entitled to the same level of first amendment protection in the claim for intentional infliction of emotional distress that they received in [respondent's] claim for libel." 797 F. 2d, at 1274. But this does not mean that a literal application of the actual malice rule is appropriate in the context of an emotional distress claim. In the court's view, the *New York Times* decision emphasized the constitutional importance not of the falsity of the statement or the defendant's disregard for the truth, but of the heightened level of culpability embodied in the requirement of "knowing . . . or reckless" conduct. Here, the *New York*

[1] While the case was pending, the ad parody was published in Hustler Magazine a second time.

[2] The jury found no liability on the part of Flynt Distributing Co., Inc. It is consequently not a party to this appeal.

*Times* standard is satisfied by the state-law requirement, and the jury's finding, that the defendants have acted intentionally or recklessly.[3] The Court of Appeals then went on to reject the contention that because the jury found that the ad parody did not describe actual facts about respondent, the ad was an opinion that is protected by the First Amendment. As the court put it, this was "irrelevant," as the issue is "whether [the ad's] publication was sufficiently outrageous to constitute intentional infliction of emotional distress." *Id.*, at 1276.[4] Petitioners then filed a petition for rehearing en banc, but this was denied by a divided court. Given the importance of the constitutional issues involved, we granted certiorari. 480 U. S. 945 (1987).

This case presents us with a novel question involving First Amendment limitations upon a State's authority to protect its citizens from the intentional infliction of emotional distress. We must decide whether a public figure may recover damages for emotional harm caused by the publication of an ad parody offensive to him, and doubtless gross and repugnant in the eyes of most. Respondent would have us find that a State's interest in protecting public figures from emotional distress is sufficient to deny First Amendment protection to speech that is patently offensive and is intended to inflict emotional injury, even when that speech could not reasonably have been interpreted as stating actual facts about the public figure involved. This we decline to do.

At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern. "[T]he

[3] Under Virginia law, in an action for intentional infliction of emotional distress a plaintiff must show that the defendant's conduct (1) is intentional or reckless; (2) offends generally accepted standards of decency or morality; (3) is causally connected with the plaintiff's emotional distress; and (4) caused emotional distress that was severe. 797 F. 2d, at 1275, n. 4 (citing *Womack* v. *Eldridge*, 215 Va. 338, 210 S. E. 2d 145 (1974)).

[4] The court below also rejected several other contentions that petitioners do not raise in this appeal.

freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole." *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485, 503–504 (1984). We have therefore been particularly vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions. The First Amendment recognizes no such thing as a "false" idea. *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 339 (1974). As Justice Holmes wrote, "when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ." *Abrams* v. *United States*, 250 U. S. 616, 630 (1919) (dissenting opinion).

The sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office or those public figures who are "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." *Associated Press* v. *Walker*, decided with *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 164 (1967) (Warren, C. J., concurring in result). Justice Frankfurter put it succinctly in *Baumgartner* v. *United States*, 322 U. S. 665, 673–674 (1944), when he said that "[o]ne of the prerogatives of American citizenship is the right to criticize public men and measures." Such criticism, inevitably, will not always be reasoned or moderate; public figures as well as public officials will be subject to "vehement, caustic, and sometimes unpleasantly sharp attacks," *New York Times*, *supra*, at 270. "[T]he candidate who vaunts his spotless record and sterling integrity cannot convincingly cry 'Foul!' when an opponent or an industrious reporter attempts

to demonstrate the contrary." *Monitor Patriot Co.* v. *Roy*, 401 U. S. 265, 274 (1971).

Of course, this does not mean that *any* speech about a public figure is immune from sanction in the form of damages. Since *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), we have consistently ruled that a public figure may hold a speaker liable for the damage to reputation caused by publication of a defamatory falsehood, but only if the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.*, at 279–280. False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual's reputation that cannot easily be repaired by counterspeech, however persuasive or effective. See *Gertz*, 418 U. S., at 340, 344, n. 9. But even though falsehoods have little value in and of themselves, they are "nevertheless inevitable in free debate," *id.*, at 340, and a rule that would impose strict liability on a publisher for false factual assertions would have an undoubted "chilling" effect on speech relating to public figures that does have constitutional value. "Freedoms of expression require "'breathing space.'" *Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U. S. 767, 772 (1986) (quoting *New York Times*, *supra*, at 272). This breathing space is provided by a constitutional rule that allows public figures to recover for libel or defamation only when they can prove *both* that the statement was false and that the statement was made with the requisite level of culpability.

Respondent argues, however, that a different standard should apply in this case because here the State seeks to prevent not reputational damage, but the severe emotional distress suffered by the person who is the subject of an offensive publication. Cf. *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U. S. 562 (1977) (ruling that the "actual malice" standard does not apply to the tort of appropriation of a right of publicity). In respondent's view, and in the view of the

Court of Appeals, so long as the utterance was intended to inflict emotional distress, was outrageous, and did in fact inflict serious emotional distress, it is of no constitutional import whether the statement was a fact or an opinion, or whether it was true or false. It is the intent to cause injury that is the gravamen of the tort, and the State's interest in preventing emotional harm simply outweighs whatever interest a speaker may have in speech of this type.

Generally speaking the law does not regard the intent to inflict emotional distress as one which should receive much solicitude, and it is quite understandable that most if not all jurisdictions have chosen to make it civilly culpable where the conduct in question is sufficiently "outrageous." But in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment. In *Garrison* v. *Louisiana*, 379 U. S. 64 (1964), we held that even when a speaker or writer is motivated by hatred or ill will his expression was protected by the First Amendment:

> "Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth." *Id.*, at 73.

Thus while such a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area of public debate about public figures.

Were we to hold otherwise, there can be little doubt that political cartoonists and satirists would be subjected to damages awards without any showing that their work falsely defamed its subject. Webster's defines a caricature as "the deliberately distorted picturing or imitating of a person, literary style, etc. by exaggerating features or mannerisms for satirical effect." Webster's New Unabridged Twentieth

Century Dictionary of the English Language 275 (2d ed. 1979). The appeal of the political cartoon or caricature is often based on exploitation of unfortunate physical traits or politically embarrassing events—an exploitation often calculated to injure the feelings of the subject of the portrayal. The art of the cartoonist is often not reasoned or evenhanded, but slashing and one-sided. One cartoonist expressed the nature of the art in these words:

> "The political cartoon is a weapon of attack, of scorn and ridicule and satire; it is least effective when it tries to pat some politician on the back. It is usually as welcome as a bee sting and is always controversial in some quarters." Long, The Political Cartoon: Journalism's Strongest Weapon, The Quill 56, 57 (Nov. 1962).

Several famous examples of this type of intentionally injurious speech were drawn by Thomas Nast, probably the greatest American cartoonist to date, who was associated for many years during the post-Civil War era with Harper's Weekly. In the pages of that publication Nast conducted a graphic vendetta against William M. "Boss" Tweed and his corrupt associates in New York City's "Tweed Ring." It has been described by one historian of the subject as "a sustained attack which in its passion and effectiveness stands alone in the history of American graphic art." M. Keller, The Art and Politics of Thomas Nast 177 (1968). Another writer explains that the success of the Nast cartoon was achieved "because of the emotional impact of its presentation. It continuously goes beyond the bounds of good taste and conventional manners." C. Press, The Political Cartoon 251 (1981).

Despite their sometimes caustic nature, from the early cartoon portraying George Washington as an ass down to the present day, graphic depictions and satirical cartoons have played a prominent role in public and political debate. Nast's castigation of the Tweed Ring, Walt McDougall's characterization of Presidential candidate James G. Blaine's banquet with the millionaires at Delmonico's as "The Royal

Feast of Belshazzar," and numerous other efforts have undoubtedly had an effect on the course and outcome of contemporaneous debate. Lincoln's tall, gangling posture, Teddy Roosevelt's glasses and teeth, and Franklin D. Roosevelt's jutting jaw and cigarette holder have been memorialized by political cartoons with an effect that could not have been obtained by the photographer or the portrait artist. From the viewpoint of history it is clear that our political discourse would have been considerably poorer without them.

Respondent contends, however, that the caricature in question here was so "outrageous" as to distinguish it from more traditional political cartoons. There is no doubt that the caricature of respondent and his mother published in Hustler is at best a distant cousin of the political cartoons described above, and a rather poor relation at that. If it were possible by laying down a principled standard to separate the one from the other, public discourse would probably suffer little or no harm. But we doubt that there is any such standard, and we are quite sure that the pejorative description "outrageous" does not supply one. "Outrageousness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression. An "outrageousness" standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience. See *NAACP* v. *Claiborne Hardware Co.*, 458 U. S. 886, 910 (1982) ("Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action"). And, as we stated in *FCC* v. *Pacifica Foundation*, 438 U. S. 726 (1978):

> "[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.

> For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas." *Id.*, at 745–746.

See also *Street* v. *New York*, 394 U. S. 576, 592 (1969) ("It is firmly settled that . . . the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers").

Admittedly, these oft-repeated First Amendment principles, like other principles, are subject to limitations. We recognized in *Pacifica Foundation*, that speech that is "'vulgar,' 'offensive,' and 'shocking'" is "not entitled to absolute constitutional protection under all circumstances." 438 U. S., at 747. In *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942), we held that a State could lawfully punish an individual for the use of insulting "'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.*, at 571–572. These limitations are but recognition of the observation in *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U. S. 749, 758 (1985), that this Court has "long recognized that not all speech is of equal First Amendment importance." But the sort of expression involved in this case does not seem to us to be governed by any exception to the general First Amendment principles stated above.

We conclude that public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with "actual malice," *i. e.*, with knowledge that the statement was false or with reckless disregard as to whether or not it was true. This is not merely a "blind application" of the *New York Times* standard, see *Time, Inc.* v. *Hill*, 385 U. S. 374, 390 (1967), it reflects our considered judgment that such a standard is necessary to give adequate "breathing space" to the freedoms protected by the First Amendment.

Here it is clear that respondent Falwell is a "public figure" for purposes of First Amendment law.[5] The jury found against respondent on his libel claim when it decided that the Hustler ad parody could not "reasonably be understood as describing actual facts about [respondent] or actual events in which [he] participated." App. to Pet. for Cert. C1. The Court of Appeals interpreted the jury's finding to be that the ad parody "was not reasonably believable," 797 F. 2d, at 1278, and in accordance with our custom we accept this finding. Respondent is thus relegated to his claim for damages awarded by the jury for the intentional infliction of emotional distress by "outrageous" conduct. But for reasons heretofore stated this claim cannot, consistently with the First Amendment, form a basis for the award of damages when the conduct in question is the publication of a caricature such as the ad parody involved here. The judgment of the Court of Appeals is accordingly

*Reversed.*

JUSTICE KENNEDY took no part in the consideration or decision of this case.

JUSTICE WHITE, concurring in the judgment.

As I see it, the decision in *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), has little to do with this case, for here the jury found that the ad contained no assertion of fact. But I agree with the Court that the judgment below, which penalized the publication of the parody, cannot be squared with the First Amendment.

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[5] Neither party disputes this conclusion. Respondent is the host of a nationally syndicated television show and was the founder and president of a political organization formerly known as the Moral Majority. He is also the founder of Liberty University in Lynchburg, Virginia, and is the author of several books and publications. Who's Who in America 849 (44th ed. 1986–1987).

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

# SUPREME COURT OF THE UNITED STATES

Syllabus

## LINDKE *v.* FREED

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 22–611. Argued October 31, 2023—Decided March 15, 2024

James Freed, like countless other Americans, created a private Facebook profile sometime before 2008. He eventually converted his profile to a public "page," meaning that *anyone* could see and comment on his posts. In 2014, Freed updated his Facebook page to reflect that he was appointed city manager of Port Huron, Michigan, describing himself as "Daddy to Lucy, Husband to Jessie and City Manager, Chief Administrative Officer for the citizens of Port Huron, MI." Freed continued to operate his Facebook page himself and continued to post prolifically (and primarily) about his personal life. Freed also posted information related to his job, such as highlighting communications from other city officials and soliciting feedback from the public on issues of concern. Freed often responded to comments on his posts, including those left by city residents with inquiries about community matters. He occasionally deleted comments that he considered "derogatory" or "stupid."

After the COVID–19 pandemic began, Freed posted about it. Some posts were personal, and some contained information related to his job. Facebook user Kevin Lindke commented on some of Freed's posts, unequivocally expressing his displeasure with the city's approach to the pandemic. Initially, Freed deleted Lindke's comments; ultimately, he blocked him from commenting at all. Lindke sued Freed under 42 U. S. C. §1983, alleging that Freed had violated his First Amendment rights. As Lindke saw it, he had the right to comment on Freed's Facebook page because it was a public forum. The District Court determined that because Freed managed his Facebook page in his private capacity, and because only state action can give rise to liability under §1983, Lindke's claim failed. The Sixth Circuit affirmed.

*Held*: A public official who prevents someone from commenting on the official's social-media page engages in state action under §1983 only if

Syllabus

the official both (1) possessed actual authority to speak on the State's behalf on a particular matter, and (2) purported to exercise that authority when speaking in the relevant social-media posts. Pp. 5–15.

(a) Section 1983 provides a cause of action against "[e]very person who, *under color of any statute, ordinance, regulation, custom, or usage, of any State*" deprives someone of a federal constitutional or statutory right. (Emphasis added.) Section 1983's "under color of" text makes clear that it is a provision designed as a protection against acts attributable to a State, not those of a private person. In the run-of-the-mill case, state action is easy to spot. Courts do not ordinarily pause to consider whether §1983 applies to the actions of police officers, public schools, or prison officials. Sometimes, however, the line between private conduct and state action is difficult to draw. In *Griffin* v. *Maryland*, 378 U. S. 130, for example, it was the source of the power, not the identity of the employer, which controlled in the case of a deputized sheriff who was held to have engaged in state action while employed by a privately owned amusement park. Since *Griffin*, most state-action precedents have grappled with whether a nominally private person engaged in state action, but this case requires analyzing whether a *state official* engaged in state action or functioned as a private citizen.

Freed's status as a state employee is not determinative. The distinction between private conduct and state action turns on substance, not labels: Private parties can act with the authority of the State, and state officials have private lives and their own constitutional rights—including the First Amendment right to speak about their jobs and exercise editorial control over speech and speakers on their personal platforms. Here, if Freed acted in his private capacity when he blocked Lindke and deleted his comments, he did not violate Lindke's First Amendment rights—instead, he exercised his own. Pp. 5–8.

(b) In the case of a public official using social media, a close look is definitely necessary to categorize conduct. In cases analogous to this one, precedent articulates principles to distinguish between personal and official communication in the social-media context. A public official's social-media activity constitutes state action under §1983 only if the official (1) possessed actual authority to speak on the State's behalf, and (2) purported to exercise that authority when he spoke on social media. The appearance and function of the social-media activity are relevant at the second step, but they cannot make up for a lack of state authority at the first. Pp. 8–15.

(1) The test's first prong is grounded in the bedrock requirement that "the conduct allegedly causing the deprivation of a federal right be *fairly attributable to the State.*" *Lugar* v. *Edmondson Oil Co.*, 457 U. S. 922, 937 (emphasis added). Lindke's focus on appearance skips

over this critical step. Unless Freed was "possessed of state authority" to post city updates and register citizen concerns, *Griffin*, 378 U. S., at 135, his conduct is not attributable to the State. Importantly, Lindke must show more than that Freed had *some* authority to communicate with residents on behalf of Port Huron. The alleged censorship must be connected to speech on a matter within Freed's bailiwick. There must be a tie between the official's authority and "the gravamen of the plaintiff's complaint." *Blum* v. *Yaretsky*, 457 U. S. 991, 1003.

To misuse power, one must possess it in the first place, and §1983 lists the potential sources: "statute, ordinance, regulation, custom, or usage." Determining the scope of an official's power requires careful attention to the relevant source of that power and what authority it reasonably encompasses. The threshold inquiry to establish state action is not whether making official announcements *could* fit within a job description but whether making such announcements is *actually* part of the job that the State entrusted the official to do. Pp. 9–12.

(2) For social-media activity to constitute state action, an official must not only have state authority, he must also purport to use it. If the official does not speak in furtherance of his official responsibilities, he speaks with his own voice. Here, if Freed's account had carried a label—*e.g.,* "this is the personal page of James R. Freed"—he would be entitled to a heavy presumption that all of his posts were personal, but Freed's page was not designated either "personal" or "official." The ambiguity surrounding Freed's page requires a fact-specific undertaking in which posts' content and function are the most important considerations. A post that expressly invokes state authority to make an announcement not available elsewhere is official, while a post that merely repeats or shares otherwise available information is more likely personal. Lest any official lose the right to speak about public affairs in his personal capacity, the plaintiff must show that the official purports to exercise state authority in specific posts. The nature of the social-media technology matters to this analysis. For example, because Facebook's blocking tool operates on a page-wide basis, a court would have to consider whether Freed had engaged in state action with respect to any post on which Lindke wished to comment. Pp. 12–15.

37 F. 4th 1199, vacated and remanded.

BARRETT, J., delivered the opinion for a unanimous Court.

NOTICE: This opinion is subject to formal revision before publication in the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, pio@supremecourt.gov, of any typographical or other formal errors.

# SUPREME COURT OF THE UNITED STATES

No. 22–611

KEVIN LINDKE, PETITIONER *v.* JAMES R. FREED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[March 15, 2024]

JUSTICE BARRETT delivered the opinion of the Court.

Like millions of Americans, James Freed maintained a Facebook account on which he posted about a wide range of topics, including his family and his job. Like most of those Americans, Freed occasionally received unwelcome comments on his posts. In response, Freed took a step familiar to Facebook users: He deleted the comments and blocked those who made them.

For most people with a Facebook account, that would have been the end of it. But Kevin Lindke, one of the unwelcome commenters, sued Freed for violating his right to free speech. Because the First Amendment binds only the government, this claim is a nonstarter if Freed posted as a private citizen. Freed, however, is not only a private citizen but also the city manager of Port Huron, Michigan—and while Freed insists that his Facebook account was strictly personal, Lindke argues that Freed acted in his official capacity when he silenced Lindke's speech.

When a government official posts about job-related topics on social media, it can be difficult to tell whether the speech is official or private. We hold that such speech is attributable to the State only if the official (1) possessed actual authority to speak on the State's behalf, and (2) purported to

exercise that authority when he spoke on social media.

## I

### A

Sometime before 2008, while he was a college student, James Freed created a private Facebook profile that he shared only with "friends." In Facebook lingo, "friends" are not necessarily confidants or even real-life acquaintances. Users become "friends" when one accepts a "friend request" from another; after that, the two can generally see and comment on one another's posts and photos. When Freed, an avid Facebook user, began nearing the platform's 5,000-friend limit, he converted his profile to a public "page." This meant that *anyone* could see and comment on his posts. Freed chose "public figure" for his page's category, "James Freed" for its title, and "JamesRFreed1" as his username. Facebook did not require Freed to satisfy any special criteria either to convert his Facebook profile to a public page or to describe himself as a public figure.

In 2014, Freed was appointed city manager of Port Huron, Michigan, and he updated his Facebook page to reflect the new job. For his profile picture, Freed chose a photo of himself in a suit with a city lapel pin. In the "About" section, Freed added his title, a link to the city's website, and the city's general email address. He described himself as "Daddy to Lucy, Husband to Jessie and City Manager, Chief Administrative Officer for the citizens of Port Huron, MI."

As before his appointment, Freed operated his Facebook page himself. And, as before his appointment, Freed posted prolifically (and primarily) about his personal life. He uploaded hundreds of photos of his daughter. He shared about outings like the Daddy Daughter Dance, dinner with his wife, and a family nature walk. He posted Bible verses, updates on home-improvement projects, and pictures of his dog, Winston.

Freed also posted information related to his job. He described mundane activities, like visiting local high schools, as well as splashier ones, like starting reconstruction of the city's boat launch. He shared news about the city's efforts to streamline leaf pickup and stabilize water intake from a local river. He highlighted communications from other city officials, like a press release from the fire chief and an annual financial report from the finance department. On occasion, Freed solicited feedback from the public—for instance, he once posted a link to a city survey about housing and encouraged his audience to complete it.

Freed's readers frequently commented on his posts, sometimes with reactions (for example, "Good job it takes skills" on a picture of his sleeping daughter) and sometimes with questions (for example, "Can you allow city residents to have chickens?"). Freed often replied to the comments, including by answering inquiries from city residents. (City residents can have chickens and should "call the Planning Dept for details.") He occasionally deleted comments that he thought were "derogatory" or "stupid."

After the COVID–19 pandemic began, Freed posted about that. Some posts were personal, like pictures of his family spending time at home and outdoors to "[s]tay safe" and "[s]ave lives." Some contained general information, like case counts and weekly hospitalization numbers. Others related to Freed's job, like a description of the city's hiring freeze and a screenshot of a press release about a relief package that he helped prepare.

Enter Kevin Lindke. Unhappy with the city's approach to the pandemic, Lindke visited Freed's page and said so. For example, in response to one of Freed's posts, Lindke commented that the city's pandemic response was "abysmal" and that "the city deserves better." When Freed posted a photo of himself and the mayor picking up takeout from a local restaurant, Lindke complained that while "residents [we]re suffering," the city's leaders were eating at an

expensive restaurant "instead of out talking to the community." Initially, Freed deleted Lindke's comments; ultimately, he blocked him. Once blocked, Lindke could see Freed's posts but could no longer comment on them.

B

Lindke sued Freed under 42 U. S. C. §1983, alleging that Freed had violated his First Amendment rights. As Lindke saw it, he had the right to comment on Freed's Facebook page, which he characterized as a public forum. Freed, Lindke claimed, had engaged in impermissible viewpoint discrimination by deleting unfavorable comments and blocking the people who made them.

The District Court granted summary judgment to Freed. Because only state action can give rise to liability under §1983, Lindke's claim depended on whether Freed acted in a "private" or "public" capacity. 563 F. Supp. 3d 704, 714 (ED Mich. 2021). The "prevailing personal quality of Freed's post[s]," the absence of "government involvement" with his account, and the lack of posts conducting official business led the court to conclude that Freed managed his Facebook page in his private capacity, so Lindke's claim failed. *Ibid.*

The Sixth Circuit affirmed. It noted that "the caselaw is murky as to when a state official acts personally and when he acts officially" for purposes of §1983. 37 F. 4th 1199, 1202 (2022). To sort the personal from the official, that court "asks whether the official is 'performing an actual or apparent duty of his office,' or if he could not have behaved as he did 'without the authority of his office.'" *Id.*, at 1203 (quoting *Waters* v. *Morristown*, 242 F. 3d 353, 359 (CA6 2001)). Applying this precedent to the social-media context, the Sixth Circuit held that an official's activity is state action if the "text of state law requires an officeholder to maintain a social-media account," the official "use[s] . . . state resources" or "government staff" to run the account, or the

"accoun[t] belong[s] to an office, rather than an individual officeholder." 37 F. 4th, at 1203–1204. These situations, the Sixth Circuit explained, make an official's social-media activity "'fairly attributable'" to the State. *Id.*, at 1204 (quoting *Lugar* v. *Edmondson Oil Co.*, 457 U. S. 922, 937 (1982)). And it concluded that Freed's activity was not.

The Sixth Circuit's approach to state action in the social-media context differs from that of the Second and Ninth Circuits, which focus less on the connection between the official's authority and the account and more on whether the account's appearance and content look official. See, *e.g.*, *Garnier* v. *O'Connor-Ratcliff*, 41 F. 4th 1158, 1170–1171 (CA9 2022); *Knight First Amdt. Inst. at Columbia Univ.* v. *Trump*, 928 F. 3d 226, 236 (CA2 2019), vacated as moot *sub nom. Biden* v. *Knight First Amdt. Inst. at Columbia Univ.*, 593 U. S. ___ (2021). We granted certiorari. 598 U. S. ___ (2023).

## II

Section 1983 provides a cause of action against "[e]very person who, *under color of any statute, ordinance, regulation, custom, or usage, of any State*" deprives someone of a federal constitutional or statutory right. (Emphasis added.) As its text makes clear, this provision protects against acts attributable to a State, not those of a private person. This limit tracks that of the Fourteenth Amendment, which obligates *States* to honor the constitutional rights that §1983 protects. §1 ("No *State* shall . . . nor shall any *State* deprive . . . " (emphasis added)); see also *Lugar*, 457 U. S., at 929 ("[T]he statutory requirement of action 'under color of state law' and the 'state action' requirement of the Fourteenth Amendment are identical"). The need for governmental action is also explicit in the Free Speech Clause, the guarantee that Lindke invokes in this case. Amdt. 1 ("*Congress* shall make no law . . . abridging the freedom of speech . . . " (emphasis added)); see also *Manhattan Community Access*

*Corp.* v. *Halleck*, 587 U. S. 802, 808 (2019) ("[T]he Free Speech Clause prohibits only *governmental* abridgment of speech," not "*private* abridgment of speech"). In short, the state-action requirement is both well established and reinforced by multiple sources.[1]

In the run-of-the-mill case, state action is easy to spot. Courts do not ordinarily pause to consider whether §1983 applies to the actions of police officers, public schools, or prison officials. See, *e.g.*, *Graham* v. *Connor*, 490 U. S. 386, 388 (1989) (police officers); *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503, 504–505 (1969) (public schools); *Estelle* v. *Gamble*, 429 U. S. 97, 98 (1976) (prison officials). And, absent some very unusual facts, no one would credit a child's assertion of free speech rights against a parent, or a plaintiff's complaint that a nosy neighbor unlawfully searched his garage.

Sometimes, however, the line between private conduct and state action is difficult to draw. *Griffin* v. *Maryland* is a good example. 378 U. S. 130 (1964). There, we held that a security guard at a privately owned amusement park engaged in state action when he enforced the park's policy of segregation against black protesters. *Id.*, at 132–135. Though employed by the park, the guard had been "deputized as a sheriff of Montgomery County" and possessed "'the same power and authority'" as any other deputy sheriff. *Id.*, at 132, and n. 1. The State had therefore allowed its power to be exercised by someone in the private sector. And the source of the power, not the identity of the employer, controlled.

By and large, our state-action precedents have grappled

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[1] Because local governments are subdivisions of the State, actions taken under color of a local government's law, custom, or usage count as "state" action for purposes of §1983. See *Monell* v. *New York City Dept. of Social Servs.*, 436 U. S. 658, 690–691 (1978). And when a state or municipal employee violates a federal right while acting "under color of law," he can be sued in an individual capacity, as Freed was here.

with variations of the question posed in *Griffin*: whether a nominally private person has engaged in state action for purposes of §1983. See, *e.g.*, *Marsh* v. *Alabama*, 326 U. S. 501, 502–503 (1946) (company town); *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 146–147 (1970) (restaurant); *Flagg Bros., Inc.* v. *Brooks*, 436 U. S. 149, 151–152 (1978) (warehouse company). Today's case, by contrast, requires us to analyze whether a *state official* engaged in state action or functioned as a private citizen. This Court has had little occasion to consider how the state-action requirement applies in this circumstance.

The question is difficult, especially in a case involving a state or local official who routinely interacts with the public. Such officials may look like they are always on the clock, making it tempting to characterize every encounter as part of the job. But the state-action doctrine avoids such broad-brush assumptions—for good reason. While public officials can act on behalf of the State, they are also private citizens with their own constitutional rights. By excluding from liability "acts of officers in the ambit of their personal pursuits," *Screws* v. *United States*, 325 U. S. 91, 111 (1945) (plurality opinion), the state-action requirement "protects a robust sphere of individual liberty" for those who serve as public officials or employees, *Halleck*, 587 U. S., at 808.

The dispute between Lindke and Freed illustrates this dynamic. Freed did not relinquish his First Amendment rights when he became city manager. On the contrary, "the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." *Garcetti* v. *Ceballos*, 547 U. S. 410, 417 (2006). This right includes the ability to speak about "information related to or learned through public employment," so long as the speech is not "itself ordinarily within the scope of [the] employee's duties." *Lane* v. *Franks*, 573 U. S. 228, 236, 240 (2014). Where the right exists, "editorial control over speech and speakers on [the public employee's]

properties or platforms" is part and parcel of it. *Halleck*, 587 U. S., at 816. Thus, if Freed acted in his private capacity when he blocked Lindke and deleted his comments, he did not violate Lindke's First Amendment rights—instead, he exercised his own.

So Lindke cannot hang his hat on Freed's status as a state employee. The distinction between private conduct and state action turns on substance, not labels: Private parties can act with the authority of the State, and state officials have private lives and their own constitutional rights. Categorizing conduct, therefore, can require a close look.

## III

A close look is definitely necessary in the context of a public official using social media. There are approximately 20 million state and local government employees across the Nation, with an extraordinarily wide range of job descriptions—from Governors, mayors, and police chiefs to teachers, healthcare professionals, and transportation workers. Many use social media for personal communication, official communication, or both—and the line between the two is often blurred. Moreover, social media involves a variety of different and rapidly changing platforms, each with distinct features for speaking, viewing, and removing speech. The Court has frequently emphasized that the state-action doctrine demands a fact-intensive inquiry. See, *e.g.*, *Reitman* v. *Mulkey*, 387 U. S. 369, 378 (1967); *Gilmore* v. *Montgomery*, 417 U. S. 556, 574 (1974). We repeat that caution here.

That said, our precedent articulates principles that govern cases analogous to this one. For the reasons we explain below, a public official's social-media activity constitutes state action under §1983 only if the official (1) possessed actual authority to speak on the State's behalf, and (2) purported to exercise that authority when he spoke on social media. The appearance and function of the social-media activity are relevant at the second step, but they cannot make

up for a lack of state authority at the first.

A

The first prong of this test is grounded in the bedrock requirement that "the conduct allegedly causing the deprivation of a federal right be *fairly attributable to the State*." *Lugar*, 457 U. S., at 937 (emphasis added). An act is not attributable to a State unless it is traceable to the State's power or authority. Private action—no matter how "official" it looks—lacks the necessary lineage.

This rule runs through our cases. *Griffin* stresses that the security guard was "possessed of state authority" and "purport[ed] to act under that authority." 378 U. S., at 135. *West* v. *Atkins* states that the "traditional definition" of state action "requires that the defendant . . . have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" 487 U. S. 42, 49 (1988) (quoting *United States* v. *Classic*, 313 U. S. 299, 326 (1941)). *Lugar* emphasizes that state action exists only when "the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority." 457 U. S., at 939; see also, *e.g.*, *Edmonson* v. *Leesville Concrete Co.*, 500 U. S. 614, 620 (1991) (describing state action as the "exercise of a right or privilege having its source in state authority"); *Screws*, 325 U. S., at 111 (plurality opinion) (police-officer defendants "were authorized to make an arrest and to take such steps as were necessary to make the arrest effective"). By contrast, when the challenged conduct "entail[s] functions and obligations in no way dependent on state authority," state action does not exist. *Polk County* v. *Dodson*, 454 U. S. 312, 318–319 (1981) (no state action because criminal defense "is essentially a private function . . . for which state office and authority are not needed"); see also *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345, 358–359 (1974).

Lindke's focus on appearance skips over this crucial step.

He insists that Freed's social-media activity constitutes state action because Freed's Facebook page looks and functions like an outlet for city updates and citizen concerns. But Freed's conduct is not attributable to the State unless he was "possessed of state authority" to post city updates and register citizen concerns. *Griffin*, 378 U. S., at 135. If the State did not entrust Freed with these responsibilities, it cannot "fairly be blamed" for the way he discharged them. *Lugar*, 457 U. S., at 936. Lindke imagines that Freed can conjure the power of the State through his own efforts. Yet the presence of state authority must be real, not a mirage.

Importantly, Lindke must show more than that Freed had *some* authority to communicate with residents on behalf of Port Huron. The alleged censorship must be connected to speech on a matter within Freed's bailiwick. For example, imagine that Freed posted a list of local restaurants with health-code violations and deleted snarky comments made by other users. If public health is not within the portfolio of the city manager, then neither the post nor the deletions would be traceable to Freed's state authority—because he had none. For state action to exist, the State must be "responsible for the specific conduct of which the plaintiff complains." *Blum* v. *Yaretsky*, 457 U. S. 991, 1004 (1982) (emphasis deleted). There must be a tie between the official's authority and "the gravamen of the plaintiff's complaint." *Id.*, at 1003.

To be clear, the "[*m*]*isuse* of power, possessed by virtue of state law," constitutes state action. *Classic*, 313 U. S., at 326 (emphasis added); see also, *e.g.*, *Screws*, 325 U. S., at 110 (plurality opinion) (state action where "the power which [state officers] were authorized to exercise was misused"). While the state-action doctrine requires that the State have granted an official the type of authority that he used to violate rights—*e.g.*, the power to arrest—it encompasses cases where his "particular action"—*e.g.*, an arrest made with excessive force—violated state or federal law. *Griffin*,

378 U. S., at 135; see also *Home Telephone & Telegraph Co.* v. *Los Angeles*, 227 U. S. 278, 287–288 (1913) (the Fourteenth Amendment encompasses "abuse by a state officer . . . of the powers possessed"). Every §1983 suit alleges a misuse of power, because no state actor has the authority to deprive someone of a federal right. To misuse power, however, one must possess it in the first place.

Where does the power come from? Section 1983 lists the potential sources: "statute, ordinance, regulation, custom, or usage." Statutes, ordinances, and regulations refer to written law through which a State can authorize an official to speak on its behalf. "Custom" and "usage" encompass "persistent practices of state officials" that are "so permanent and well settled" that they carry "the force of law." *Adickes*, 398 U. S., at 167–168. So a city manager like Freed would be authorized to speak for the city if written law like an ordinance empowered him to make official announcements. He would also have that authority even in the absence of written law if, for instance, prior city managers have purported to speak on its behalf and have been recognized to have that authority for so long that the manager's power to do so has become "permanent and well settled." *Id.*, at 168. And if an official has authority to speak for the State, he may have the authority to do so on social media even if the law does not make that explicit.

Determining the scope of an official's power requires careful attention to the relevant statute, ordinance, regulation, custom, or usage. In some cases, a grant of authority over particular subject matter may reasonably encompass authority to speak about it officially. For example, state law might grant a high-ranking official like the director of the state department of transportation broad responsibility for the state highway system that, in context, includes authority to make official announcements on that subject. At the same time, courts must not rely on "'excessively broad job descriptions'" to conclude that a government employee is

authorized to speak for the State. *Kennedy* v. *Bremerton School Dist.*, 597 U. S. 507, 529 (2022) (quoting *Garcetti*, 547 U. S., at 424). The inquiry is not whether making official announcements *could* fit within the job description; it is whether making official announcements is *actually* part of the job that the State entrusted the official to do.

In sum, a defendant like Freed must have actual authority rooted in written law or longstanding custom to speak for the State. That authority must extend to speech of the sort that caused the alleged rights deprivation. If the plaintiff cannot make this threshold showing of authority, he cannot establish state action.

B

For social-media activity to constitute state action, an official must not only have state authority—he must also purport to use it. *Griffin*, 378 U. S., at 135. State officials have a choice about the capacity in which they choose to speak. "[G]enerally, a public employee" purports to speak on behalf of the State while speaking "in his official capacity or" when he uses his speech to fulfill "his responsibilities pursuant to state law." *West*, 487 U. S., at 50. If the public employee does not use his speech in furtherance of his official responsibilities, he is speaking in his own voice.

Consider a hypothetical from the offline world. A school board president announces at a school board meeting that the board has lifted pandemic-era restrictions on public schools. The next evening, at a backyard barbecue with friends whose children attend public schools, he shares that the board has lifted the pandemic-era restrictions. The former is state action taken in his official capacity as school board president; the latter is private action taken in his personal capacity as a friend and neighbor. While the substance of the announcement is the same, the context—an official meeting versus a private event—differs. He invoked his official authority only when he acted as school board

president.

The context of Freed's speech is hazier than that of the hypothetical school board president. Had Freed's account carried a label (*e.g.*, "this is the personal page of James R. Freed") or a disclaimer (*e.g.*, "the views expressed are strictly my own"), he would be entitled to a heavy (though not irrebuttable) presumption that all of the posts on his page were personal. Markers like these give speech the benefit of clear context: Just as we can safely presume that speech at a backyard barbeque is personal, we can safely presume that speech on a "personal" page is personal (absent significant evidence indicating that a post is official).[2] Conversely, context can make clear that a social-media account purports to speak for the government—for instance, when an account belongs to a political subdivision (*e.g.*, a "City of Port Huron" Facebook page) or is passed down to whomever occupies a particular office (*e.g.*, an "@PHuronCityMgr" Instagram account). Freed's page, however, was not designated either "personal" or "official," raising the prospect that it was "mixed use"—a place where he made some posts in his personal capacity and others in his capacity as city manager.

Categorizing posts that appear on an ambiguous page like Freed's is a fact-specific undertaking in which the post's content and function are the most important considerations. In some circumstances, the post's content and

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[2] An official cannot insulate government business from scrutiny by conducting it on a personal page. The Solicitor General offers the particularly clear example of an official who designates space on his nominally personal page as the official channel for receiving comments on a proposed regulation. Because the power to conduct notice-and-comment rulemaking belongs exclusively to the State, its exercise is necessarily governmental. Similarly, a mayor would engage in state action if he hosted a city council meeting online by streaming it only on his personal Facebook page. By contrast, a post that is compatible with either a "personal capacity" or "official capacity" designation is "personal" if it appears on a personal page.

function might make the plaintiff's argument a slam dunk. Take a mayor who makes the following announcement exclusively on his Facebook page: "Pursuant to Municipal Ordinance 22.1, I am temporarily suspending enforcement of alternate-side parking rules." The post's express invocation of state authority, its immediate legal effect, and the fact that the order is not available elsewhere make clear that the mayor is purporting to discharge an official duty. If, by contrast, the mayor merely repeats or shares otherwise available information—for example, by linking to the parking announcement on the city's webpage—it is far less likely that he is purporting to exercise the power of his office. Instead, it is much more likely that he is engaging in private speech "relate[d] to his public employment" or "concern[ing] information learned during that employment." *Lane*, 573 U. S., at 238.

Hard-to-classify cases require awareness that an official does not necessarily purport to exercise his authority simply by posting about a matter within it. He might post job-related information for any number of personal reasons, from a desire to raise public awareness to promoting his prospects for reelection. Moreover, many public officials possess a broad portfolio of governmental authority that includes routine interaction with the public, and it may not be easy to discern a boundary between their public and private lives. Yet these officials too have the right to speak about public affairs in their personal capacities. See, *e.g.*, *id.*, at 235–236. Lest any official lose that right, it is crucial for the plaintiff to show that the official is purporting to exercise state authority in specific posts. And when there is doubt, additional factors might cast light—for example, an official who uses government staff to make a post will be hard pressed to deny that he was conducting government business.

One last point: The nature of the technology matters to the state-action analysis. Freed performed two actions to

which Lindke objected: He deleted Lindke's comments and blocked him from commenting again. So far as deletion goes, the only relevant posts are those from which Lindke's comments were removed. Blocking, however, is a different story. Because blocking operated on a page-wide basis, a court would have to consider whether Freed had engaged in state action with respect to any post on which Lindke wished to comment. The bluntness of Facebook's blocking tool highlights the cost of a "mixed use" social-media account: If page-wide blocking is the only option, a public official might be unable to prevent someone from commenting on his personal posts without risking liability for also preventing comments on his official posts.[3] A public official who fails to keep personal posts in a clearly designated personal account therefore exposes himself to greater potential liability.

* * *

The state-action doctrine requires Lindke to show that Freed (1) had actual authority to speak on behalf of the State on a particular matter, and (2) purported to exercise that authority in the relevant posts. To the extent that this test differs from the one applied by the Sixth Circuit, we vacate its judgment and remand the case for further proceedings consistent with this opinion.

*It is so ordered.*

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[3] On some platforms, a blocked user might be unable even to *see* the blocker's posts. See, *e.g.*, *Garnier* v. *O'Connor-Ratcliff*, 41 F. 4th, 1158, 1164 (CA9 2022) (noting that "on Twitter, once a user has been 'blocked,' the individual can neither interact with nor view the blocker's Twitter feed"); *Knight First Amdt. Inst. at Columbia Univ.* v. *Trump*, 928 F. 3d 226, 231 (CA2 2019) (noting that a blocked user is unable to see, reply to, retweet, or like the blocker's tweets).

# NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE ET AL. *v.* CLAIBORNE HARDWARE CO. ET AL.

## CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

No. 81–202. Argued March 3, 1982—Decided July 2, 1982

In 1966, a boycott of white merchants in Claiborne County, Miss., was launched at a meeting of a local branch of the National Association for the Advancement of Colored People (NAACP) attended by several hundred black persons. The purpose of the boycott was to secure compliance by both civic and business leaders with a lengthy list of demands for equality and racial justice. The boycott was largely supported by speeches encouraging nonparticipants to join the common cause and by nonviolent picketing, but some acts and threats of violence did occur. In 1969, respondent white merchants filed suit in Mississippi Chancery Court for injunctive relief and damages against petitioners (the NAACP, the Mississippi Action for Progress, and a number of individuals who had participated in the boycott, including Charles Evers, the field secretary of the NAACP in Mississippi and a principal organizer of the boycott). Holding petitioners jointly and severally liable for all of respondents' lost earnings during a 7-year period from 1966 to the end of 1972 on three separate conspiracy theories, including the tort of malicious interference with respondents' businesses, the Chancery Court imposed damages liability and issued a permanent injunction. The Mississippi Supreme Court rejected two theories of liability but upheld the imposition of liability on the basis of the common-law tort theory. Based on evidence that fear of reprisals caused some black citizens to withhold their patronage from respondents' businesses, the court held that the entire boycott was unlawful and affirmed petitioners' liability for all damages "resulting from the boycott" on the ground that petitioners had *agreed* to use force, violence, and "threats" to effectuate the boycott.

*Held:*

1. The nonviolent elements of petitioners' activities are entitled to the protection of the First Amendment. Pp. 907–915.

(a) Through exercise of their First Amendment rights of speech, assembly, association, and petition, rather than through riot or revolution, petitioners sought to bring about political, social, and economic change. Pp. 907–912.

(b) While States have broad power to regulate economic activities, there is no comparable right to prohibit peaceful political activity such as that found in the boycott in this case. Pp. 912–915.

2. Petitioners are not liable in damages for the consequences of their nonviolent, protected activity. Pp. 915–920.

(a) While the State legitimately may impose damages for the consequences of violent conduct, it may not award compensation for the consequences of nonviolent, protected activity; only those losses proximately caused by the unlawful conduct may be recovered. Pp. 915–918.

(b) Similarly, the First Amendment restricts the ability of the State to impose liability on an individual solely because of his association with another. Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims. Pp. 918–920.

3. The award for all damages "resulting from the boycott" cannot be sustained, where the record discloses that all of the respondents' business losses were not proximately caused by violence or threats of violence. Pp. 920–932.

(a) To the extent that the Mississippi Supreme Court's judgment rests on the ground that "many" black citizens were "intimidated" by "threats" of "social ostracism, vilification, and traduction," it is flatly inconsistent with the First Amendment. The court's ambiguous findings are inadequate to assure the "precision of regulation" demanded by that Amendment. Pp. 920–924.

(b) Regular attendance and participation at the meetings of the Claiborne County Branch of the NAACP is an insufficient predicate on which to impose liability on the individual petitioners. Nor can liability be imposed on such individuals simply because they were either "store watchers" who stood outside the boycotted merchants' stores to record the names of black citizens who patronized the stores or members of a special group of boycott "enforcers." Pp. 924–926.

(c) For similar reasons, the judgment against Evers cannot be separately justified, nor can liability be imposed upon him on the basis of speeches that he made, because those speeches did not incite violence or specifically authorize the use of violence. His acts, being insufficient to impose liability on him, may not be used to impose liability on the NAACP, his principal. Moreover, there is no finding that Evers or any other NAACP member had either actual or apparent authority from the NAACP to commit acts of violence or to threaten violent conduct or that the NAACP ratified unlawful conduct. To impose liability on the NAACP without such a finding would impermissibly burden the rights of political association that are protected by the First Amendment. Pp. 926–932.

393 So. 2d 1290, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, BLACKMUN, POWELL, and O'CONNOR, JJ., joined. REHNQUIST, J., concurred in the result. MARSHALL, J., took no part in the consideration or decision of the case.

*Lloyd N. Cutler* argued the cause for petitioners. With him on the briefs were *James Robertson, Edward Tynes Hand, William R. Richardson, Jr., John Payton, Thomas I. Atkins, Charles E. Carter, William L. Robinson,* and *Frank R. Parker.*

*Grover Rees III* argued the cause for respondents. With him on the briefs were *Crane D. Kipp, Christopher J. Walker,* and *Dixon L. Pyles.**

JUSTICE STEVENS delivered the opinion of the Court.

The term "concerted action" encompasses unlawful conspiracies and constitutionally protected assemblies. The "looseness and pliability" of legal doctrine applicable to concerted action led Justice Jackson to note that certain joint activities have a "chameleon-like" character.[1] The boycott of white merchants in Claiborne County, Miss., that gave rise to this litigation had such a character; it included elements of criminality and elements of majesty. Evidence that fear of reprisals caused some black citizens to withhold their patronage from respondents' businesses convinced the Supreme Court of Mississippi that the entire boycott was unlawful and that each of the 92 petitioners was liable for all of its economic consequences. Evidence that persuasive rhetoric, determination to remedy past injustices, and a host of voluntary decisions by free citizens were the critical

*Briefs of *amici curiae* urging reversal were filed by *John Vanderstar, Charles S. Sims,* and *Phyllis N. Segal* for the American Civil Liberties Union et al.; by *J. Albert Woll, Laurence Gold,* and *George Kaufmann* for the American Federation of Labor and Congress of Industrial Organizations; and by *Paul S. Berger, David Bonderman, Leonard B. Simon,* and *Nathan Z. Dershowitz* for the American Jewish Congress.

[1] See *Krulewitch* v. *United States,* 336 U. S. 440, 447–449 (concurring opinion).

factors in the boycott's success presents us with the question whether the state court's judgment is consistent with the Constitution of the United States.

## I

In March 1966, black citizens of Port Gibson, Miss., and other areas of Claiborne County presented white elected officials with a list of particularized demands for racial equality and integration.[2] The complainants did not receive a satisfactory response and, at a local National Association for the Advancement of Colored People (NAACP) meeting at the First Baptist Church, several hundred black persons voted to place a boycott on white merchants in the area. On October 31, 1969, several of the merchants filed suit in state court to recover losses caused by the boycott and to enjoin future boycott activity. We recount first the course of that litigation and then consider in more detail the events that gave rise to the merchants' claim for damages.

### A

The complaint was filed in the Chancery Court of Hinds County by 17 white merchants.[3] The merchants named two corporations and 146 individuals as defendants: the NAACP, a New York membership corporation; Mississippi Action for Progress (MAP), a Mississippi corporation that im-

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[2] Port Gibson is the county seat and largest municipality in Claiborne County.

[3] The affected businesses represented by the merchants included four grocery stores, two hardware stores, a pharmacy, two general variety stores, a laundry, a liquor store, two car dealers, two auto parts stores, and a gas station. Many of the owners of these boycotted stores were civic leaders in Port Gibson and Claiborne County. Respondents Allen and Al Batten were Aldermen in Port Gibson, Record 15111; Robert Vaughan, part owner and operator of one of the boycotted stores, represented Claiborne County in the Mississippi House of Representatives, *id.*, at 15160; respondents Abraham and Hay had served on the school board, *id.*, at 14906, 14678; respondent Hudson served on the Claiborne County Democratic Committee, *id.*, at 840.

plemented the federal "Head Start" program; Aaron Henry, the President of the Mississippi State Conference of the NAACP; Charles Evers, the Field Secretary of the NAACP in Mississippi; and 144 other individuals who had participated in the boycott.[4] The complaint sought injunctive relief and an attachment of property, as well as damages. Although it alleged that the plaintiffs were suffering irreparable injury from an ongoing conspiracy, no preliminary relief was sought.

Trial began before a chancellor in equity on June 11, 1973.[5] The court heard the testimony of 144 witnesses during an 8-month trial. In August 1976, the chancellor issued an opinion and decree finding that "an overwhelming preponderance of the evidence" established the joint and several liability of

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[4] The complaint also named 52 banks as "attachment defendants." The banks answered that the NAACP had $16,800 on deposit in Mississippi.

[5] As a result of the plaintiffs' prayer for an attachment in equity, jurisdiction existed in Chancery Court. The trial judge ruled: "It was incumbent upon this court to hear the case in full once jurisdiction was assumed. To have heard the portions of this matter sounding in equity, only, and to have transferred the questions of tort liability and damages to the circuit court would have been contrary to the maxim 'equity delights to do complete justice, and not by halves.'" App. to Pet. for Cert. 56b. The defendants thus were denied a jury trial on the liability issues. Although the court recognized that it had power to empanel a jury, it declined to exercise its discretion to do so. *Ibid.* The Mississippi nonresident attachment statute that provided the basis for equitable jurisdiction has since been declared unconstitutional by both Federal District Courts in Mississippi. *MPI, Inc.* v. *McCullough*, 463 F. Supp. 887 (ND Miss. 1978); *Mississippi Chem. Corp.* v. *Chemical Constr. Corp.*, 444 F. Supp. 925 (SD Miss. 1977).

Commencement of trial was delayed by collateral proceedings in federal court. See *Henry* v. *First National Bank of Clarksdale*, 50 F. R. D. 251 (ND Miss. 1970), rev'd, 444 F. 2d 1300 (CA5 1971), cert. denied, 405 U. S. 1019. The District Court entered a preliminary injunction restraining the state proceedings on the theory that the merchants sought to infringe the defendants' First Amendment rights. The Court of Appeals reversed, holding that the mere commencement of a private tort suit did not itself involve "state action" for purposes of 28 U. S. C. § 1343(3).

130 of the defendants on three separate conspiracy theories.[6] First, the court held that the defendants were liable for the tort of malicious interference with the plaintiffs' businesses, which did not necessarily require the presence of a conspiracy.[7] Second, the chancellor found a violation of a state

[6] App. to Pet. for Cert. 2g. Of the original 148 named defendants, 16 were dismissed by stipulation of counsel (12 had died, 2 were minors, 1 was *non compos mentis*, and 1—the Reverend Dominic Cangemi—was dismissed by agreement without explanation). One defendant was dismissed because he had been misidentified in the complaint. The chancellor dismissed one defendant—state NAACP leader Aaron Henry—because "the complainants failed to meet the burden of proof as to [his] wrongdoing." *Id.*, at 28b. Thus, except for the defendants dismissed by stipulation or because of misidentification, the plaintiffs prevailed on the merits in the trial court against all but one of the defendants.

[7] Although the bulk of the court's discussion of the defendants' common-law tort liability focused on the presence of a civil conspiracy, the chancellor did not appear to hold that a concerted refusal to deal—without more—was actionable under the common law of Mississippi. The court apparently based its first theory of liability on the ground that the "malicious interference by the defendants with the businesses of the complainants as shown by the evidence in this case is tortious *per se*, and this would be true even without the element of conspiracy." *Id.*, at 42b (footnote omitted). In Mississippi, "[e]ither an individual or a corporation, whether acting in conjunction with others, or not," may be liable in an action for "malicious interference with a trade or calling." *Memphis Laundry-Cleaners* v. *Lindsey*, 192 Miss. 224, 239, 5 So. 2d 227, 232 (1941). The chancellor in this case stated that the necessary element of malice is established by proof of "the intentional performance of an act harmful to another without just or lawful cause or excuse." App. to Pet. for Cert. 42b, n. 8.

The repeated references to the presence of a conspiracy might be explained by the court's finding that each of the defendants—with the exception of Aaron Henry—was jointly and severally liable for the plaintiffs' losses. As noted, an element of the plaintiffs' common-law action was the defendants' intentional performance of an "unprivileged" act harmful to another. The chancellor stated that the evidence clearly established that "certain defendants" had committed "overt acts which were injurious to the trade and business of complainants." *Id.*, at 39b. The court continued: "Where two or more persons conspire together, the conspiracy makes the wrongful act of each person the joint acts of them all," *id.*, at 41b; "[i]t

statutory prohibition against secondary boycotts, on the theory that the defendants' primary dispute was with the governing authorities of Port Gibson and Claiborne County and not with the white merchants at whom the boycott was directed.[8] Third, the court found a violation of Mississippi's antitrust statute, on the ground that the boycott had diverted black patronage from the white merchants to black merchants and to other merchants located out of Claiborne County and thus had unreasonably limited competition between black and white merchants that had traditionally existed.[9] The chancellor specifically rejected the defendants' claim that their conduct was protected by the First Amendment.[10]

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follows that each act done in pursuance of the conspiracy by one of several conspirators is, in contemplation of the law, an act for which each is jointly and severally liable." *Ibid.* Thus, the presence of a conspiracy rendered all of the "conspirators" liable for the wrongful acts of any member of that conspiracy.

[8] See Miss. Code Ann. § 97–23–85 (1972). The chancellor found: "The testimony in the case at bar clearly shows that the principal objective of the boycott was to force the white merchants of Port Gibson and Claiborne County to bring pressure upon governing authorities to grant defendants' demands or, in the alternative, to suffer economic ruin." App. to Pet. for Cert. 51b. As noted, however, many of the merchants themselves were civic leaders. See n. 3, *supra*.

[9] See Miss. Code Ann. § 75–21–9 (1972). The court made clear that under this theory intentional participation in the concerted action rendered each defendant directly liable for all resulting damages. "As a legal principle, it is sufficient to show that the concert of action on the part of the defendants was deliberately invited, and that the defendants gave their adherence to the scheme and participated in it." App. to Pet. for Cert. 54b. The same was true of the court's secondary boycott theory; "since an illegal boycott is an invasion of a property right, the members of the boycotting combination are liable for the resulting damages." *Id.*, at 53b.

[10] In its discussion of the secondary boycott statute, the court rejected an argument that the statute was unconstitutional under the First and Fourteenth Amendments. Noting as a "basic premise" that "secondary boycotts are unlawful under both United States and Mississippi law," the court stated that "conduct and communication which are illegal are not protected

Five of the merchants offered no evidence of business losses. The chancellor found that the remaining 12 had suffered lost business earnings and lost goodwill during a 7-year period from 1966 to 1972 amounting to $944,699. That amount, plus statutory antitrust penalties of $6,000 and a $300,000 award of attorney's fees, produced a final judgment of $1,250,699, plus interest from the date of judgment and costs. As noted, the chancellor found all but 18 of the original 148 defendants jointly and severally liable for the entire judgment. The court justified imposing full liability on the national organization of the NAACP on the ground that it had failed to "repudiate" the actions of Charles Evers, its Field Secretary in Mississippi.

In addition to imposing damages liability, the chancellor entered a broad permanent injunction. He permanently enjoined petitioners from stationing "store watchers" at the respondents' business premises; from "persuading" any person to withhold his patronage from respondents; from "using demeaning and obscene language to or about any person" because that person continued to patronize the respondents; from "picketing or patroling" the premises of any of the respondents; and from using violence against any person or inflicting damage to any real or personal property.[11]

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by the constitutional provisions relating to freedom of speech." *Id.*, at 46b. In imposing liability under the state restraint of trade statute, the chancellor added: "After a careful consideration of the constitutional claims of defendants, the Court finds that none of the acts or conduct of defendants was shielded or protected by the Constitution of the United States or the Constitution of the State of Mississippi." *Id.*, at 55b–56b. Finally, in assessing damages, the court stated: "Defendants base their defense on the concept that the right to boycott and inflict losses on complainants was a legally protected right afforded them under the laws and Constitution of the United States. This Court has hereinbefore found that the conduct of the defendants was unlawful and unprotected." *Id.*, at 62b.

[11] *Id.*, at 19g. Following the entry of judgment, the defendants moved for relief from Mississippi's 125-percent supersedeas bonding requirement. Although the Mississippi Supreme Court denied the motion, a federal court

In December 1980, the Mississippi Supreme Court reversed significant portions of the trial court's judgment. 393 So. 2d 1290. It held that the secondary boycott statute was inapplicable because it had not been enacted until "the boycott had been in operation for upward of two years."[12] The court declined to rely on the restraint of trade statute, noting that the "United States Supreme Court has seen fit to hold boycotts to achieve political ends are not a violation of the Sherman Act, 15 U. S. C. § 1 (1970), after which our statute is patterned."[13] Thus, the court rejected two theories of liability that were consistent with a totally voluntary and nonviolent withholding of patronage from the white merchants.

The Mississippi Supreme Court upheld the imposition of liability, however, on the basis of the chancellor's common-law tort theory. After reviewing the chancellor's recitation of the facts, the court quoted the following finding made by the trial court:

> "In carrying out the agreement and design, certain of the defendants, acting for all others, engaged in acts of physical force and violence against the persons and property of certain customers and prospective customers. Intimidation, threats, social ostracism, vilification, and traduction were some of the devices used by the defendants to achieve the desired results. Most effective, also, was the stationing of guards ('enforcers,' 'deacons,' or 'black hats') in the vicinity of white-owned businesses. Unquestionably, the evidence shows that the volition of many black persons was overcome out of sheer fear, and they were forced and compelled against their personal wills to withhold their trade and business intercourse

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enjoined execution of the Chancery Court judgment pending appeal. *Henry* v. *First National Bank of Clarksdale*, 424 F. Supp. 633 (ND Miss. 1976), aff'd, 595 F. 2d 291 (CA5 1979), cert. denied, 444 U. S. 1074.

[12] 393 So. 2d, at 1300.

[13] *Id.*, at 1301.

> from the complainants." App. to Pet. for Cert. 39b (quoted 393 So. 2d, at 1300).

On the basis of this finding, the court concluded that the entire boycott was unlawful. "If any of these factors—force, violence, or threats—is present, then the boycott is illegal regardless of whether it is primary, secondary, economical, political, social or other."[14] In a brief passage, the court rejected petitioners' reliance on the First Amendment:

> "The agreed use of illegal force, violence, and threats against the peace to achieve a goal makes the present state of facts a conspiracy. We know of no instance, and our attention has been drawn to no decision, wherein it has been adjudicated that free speech guaranteed by the First Amendment includes in its protection the right to commit crime." *Id.*, at 1301.

The theory of the Mississippi Supreme Court, then, was that petitioners had *agreed* to use force, violence, and "threats" to effectuate the boycott.[15] To the trial court, such a finding had not been necessary.[16]

Although the Mississippi Supreme Court affirmed the chancellor's basic finding of liability, the court held that re-

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[14] *Ibid.*

[15] The court did not specifically identify the evidence linking any of the defendants to such an agreement.

[16] As noted, liability under the secondary boycott and restraint of trade statutes could be found on the basis of an entirely voluntary and nonviolent agreement to withhold patronage. See n. 9, *supra*. It is not clear whether—in its imposition of tort liability—the trial court rested on a theory similar to that ultimately advanced by the Mississippi Supreme Court. In finding an unlawful civil conspiracy—which rendered each conspirator liable for the actions of others, see n. 7, *supra*—the chancellor arguably believed that it was necessary to connect all defendants to an agreement to use force or violence to effectuate the conspiracy. See App. to Pet. for Cert. 40b–41b. The chancellor made no factual finding, however, that such an agreement existed.

spondents "did not establish their case" with respect to 38 of the defendants.[17] The court found that MAP was a victim, rather than a willing participant, in the conspiracy and dismissed—without further explanation—37 individual defendants for lack of proof. Finally, the court ruled that certain damages had been improperly awarded and that other damages had been inadequately proved. The court remanded for further proceedings on the computation of damages.[18]

We granted a petition for certiorari. 454 U. S. 1030. At oral argument, a question arose concerning the factual basis for the judgment of the Mississippi Supreme Court. As noted, that court affirmed petitioners' liability for damages on the ground that each of the petitioners had agreed to effectuate the boycott through force, violence, and threats. Such a finding was not necessary to the trial court's imposition of liability and neither state court had identified the evidence actually linking the petitioners to such an agreement. In response to a request from this Court, respondents filed a supplemental brief "specifying the acts committed by each of the petitioners giving rise to liability for damages." Supplemental Brief for Respondents 1. That brief helpfully places the petitioners in different categories; we accept respondents' framework for analysis and identify these classes as a preface to our review of the relevant incidents that occurred during the 7-year period for which damages were assessed.[19]

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[17] 393 So. 2d, at 1302.

[18] Concerning the permanent injunction entered by the chancellor, the court stated: "Although the granting of injunction has been assigned as error, the error has not been argued, and NAACP, et al. say, at the conclusion of their brief '. . . the injunctive aspects of the case are now moot. . . .'" *Id.*, at 1293. Despite this finding, the court did not vacate the injunction.

[19] Respondents acknowledge that "[t]he basis on which the Mississippi Supreme Court held that petitioners were liable for damages was 'the agreed use of illegal force, violence and threats.'" Supplemental Brief for Respondents 1–2.

First, respondents contend that liability is justified by evidence of participation in the "management" of the boycott.[20] Respondents identify two groups of persons who may be found liable as "managers": 79 individuals who regularly attended Tuesday night meetings of the NAACP at the First Baptist Church; and 11 persons who took "leadership roles" at those meetings.[21]

Second, respondents contend that liability is justified by evidence that an individual acted as a boycott "enforcer."[22] In this category, respondents identify 22 persons as members of the "Black Hats"—a special group organized during the boycott—and 19 individuals who were simply "store watchers."

Third, respondents argue that those petitioners "who themselves engaged in violent acts or who threatened violence have provided the best possible evidence that they wanted the boycott to succeed by coercion whenever it could not succeed by persuasion." *Id.*, at 10. They identify 16 in-

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[20] Respondents argue that anyone "who participates in the decisionmaking functions of an enterprise, with full knowledge of the tactics by which the enterprise is being conducted, manifests his assent to those tactics . . . ." *Id.*, at 2. Respondents thus would impose liability for the managers' *failure* to act; respondents argue that, despite evidence that boycott "enforcers" caused fear of injury to persons and property, "they were not taken from their posts and replaced by a system of voluntary compliance; there is no evidence that any of the petitioners even admonished them for their enforcement methods; the successful system of paramilitary enforcers on the streets and 'rhetorical' threats of violence by boycott leaders was left in place for the duration." *Id.*, at 5.

[21] These groups are not meant to be exclusive.

[22] "Once the pattern had been established—warnings to prospective customers, destruction of goods purchased at boycotted stores, public displays of weapons and of military discipline, denunciation of names gathered by the store-watchers, and subsequent violence against the persons and property of boycott breakers—store-watching in Port Gibson became the sort of activity from which a court could reasonably infer an intention to frighten people away from the stores." *Id.*, at 8.

dividuals for whom there is direct evidence of participation in what respondents characterize as violent acts or threats of violence.

Fourth, respondents contend that Charles Evers may be held liable because he "threatened violence on a number of occasions against boycott breakers." *Id.*, at 13. Like the chancellor, respondents would impose liability on the national NAACP because Evers "was acting in his capacity as Field Secretary of the NAACP when he committed these tortious and constitutionally unprotected acts." *Ibid.*

Finally, respondents state that they are "unable to determine on what record evidence the state courts relied in finding liability on the part of seven of the petitioners." *Id.*, at 16. With these allegations of wrongdoing in mind, we turn to consider the factual events that gave rise to this controversy.

B

The chancellor held petitioners liable for all of respondents' lost earnings during a 7-year period from 1966 to December 31, 1972. We first review chronologically the principal events that occurred during that period, describe some features of the boycott that are not in dispute, and then identify the most significant evidence of violent activity.

In late 1965 or early 1966, Charles Evers, the Field Secretary of the NAACP, helped organize the Claiborne County Branch of the NAACP. The pastor of the First Baptist Church, James Dorsey, was elected president of the Branch; regular meetings were conducted each Tuesday evening at the church. At about the same time, a group of black citizens formed a Human Relations Committee and presented a petition for redress of grievances to civic and business leaders of the white community. In response, a biracial committee—including five of the petitioners and several of the respondents—was organized and held a series of unproductive meetings.

The black members of the committee then prepared a further petition entitled "Demands for Racial Justice." This pe-

tition was presented for approval at the local NAACP meeting conducted on the first Tuesday evening in March. As described by the chancellor, "the approximately 500 people present voted their approval unanimously."[23] On March 14, 1966, the petition was presented to public officials of Port Gibson and Claiborne County.

The petition included 19 specific demands. It called for the desegregation of all public schools and public facilities, the hiring of black policemen, public improvements in black residential areas, selection of blacks for jury duty, integration of bus stations so that blacks could use all facilities, and an end to verbal abuse by law enforcement officers. It stated that "Negroes are not to be addressed by terms as 'boy,' 'girl,' 'shine,' 'uncle,' or any other offensive term, but as 'Mr.,' 'Mrs.,' or 'Miss,' as is the case with other citizens."[24] As described by the chancellor, the purpose of the demands "was to gain equal rights and opportunities for Negro citizens."[25] The petition further provided that black leaders hoped it would not be necessary to resort to the "selective buying campaigns" that had been used in other communities.[26] On March 23, two demands that had been omitted

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[23] App. to Pet. for Cert. 15b.

[24] *Id.*, at 10b.

[25] *Id.*, at 12b.

[26] The petition stated:

"We hope it will not be necessary to resort to the kind of peaceful demonstrations and selective buying campaigns which have had to be used in other communities. It takes manpower, time and energy which could be better directed at solving these problems which exist in Port Gibson and Claiborne County by mutual cooperation and efforts at tolerant understanding.

"No one likes to have to resort to picketing and other kinds of demonstration—just as no one likes to be the target of this kind of demonstration. But this sort of thing is inevitable unless there can be real progress toward giving all citizens their equal rights. There seems sometimes to be no other alternative.

"Objectives of Negro citizens of Port Gibson and Claiborne County are, simply put, to have equality of opportunity, in every aspect of life, and to end the white supremacy which has pervaded community life. This im-

from the original petition were added, one of which provided: "All stores must employ Negro clerks and cashiers."[27] This supplemental petition stated that a response was expected by April 1.

A favorable response was not received. On April 1, 1966, the Claiborne County NAACP conducted another meeting at the First Baptist Church. As described by the chancellor:

> "Several hundred black people attended the meeting, and the purpose was to decide what action should be taken relative to the twenty-one demands. Speeches were made by Evers and others, and a vote was taken. It was the unanimous vote of those present, without dissent, to place a boycott on the white merchants of Port Gibson and Claiborne County." App. to Pet. for Cert. 15b.

The boycott was underway.[28]

In September 1966, Mississippi Action for Progress, Inc. (MAP), was organized to develop community action programs in 20 counties of Mississippi. One of MAP's programs—known as Head Start—involved the use of federal funds to provide food for young children. Originally, food purchases in Claiborne County were made alternately from white-owned and black-owned stores, but in February 1967 the di-

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plies many long-range objectives such as participation in decision-making at every level of community, civic, business and political affairs." *Id.*, at 9b.

[27] *Id.*, at 13b.

[28] Although Evers' speech on April 1, 1966, was not recorded, the chancellor found: "Evers told his audience that they would be watched and that blacks who traded with white merchants would be *answerable to him.* According to Sheriff Dan McKay, who was present during the speech, Evers told the assembled black people that any 'uncle toms' who broke the boycott would 'have their necks broken' by their own people. Evers' remarks were directed to all 8,000-plus black residents of Claiborne County, and not merely the relatively few members of the Claiborne NAACP." *Id.*, at 17b–18b (footnote omitted).

rectors of MAP authorized their Claiborne County representatives to purchase food only from black-owned stores. Since MAP bought substantial quantities of food, the consequences of this decision were significant. A large portion of the trial was devoted to the question whether MAP participated in the boycott voluntarily and—under the chancellor's theories of liability—could be held liable for the resulting damages. The chancellor found MAP a willing participant, noting that "during the course of the trial, the only Head Start cooks called to the witness stand testified that they refused to go into white-owned stores to purchase groceries for the children in the program *for the reason that they were in favor of the boycott and wanted to honor it.*"[29]

Several events occurred during the boycott that had a strong effect on boycott activity. On February 1, 1967, Port Gibson employed its first black policeman. During that month, the boycott was lifted on a number of merchants. On April 4, 1968, Dr. Martin Luther King, Jr., was assassinated in Memphis. The chancellor found that this tragic event had a depressing effect on the black community and, as a result, the boycott "tightened."[30]

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[29] *Id.*, at 22b (emphasis in original). The chancellor also noted that MAP's Board of Directors "did not seek help from local law-enforcement officers, nor did they complain to United States authorities for protection of their cooks from possible reprisals arising from trade with the white merchants"; and that "MAP employees in Claiborne County continued to take an active part in the NAACP activities and to support the boycott by picketing and marching." *Id.*, at 23b. The Mississippi Supreme Court rejected the chancellor's findings and concluded that MAP was not a willing participant in the boycott, thus absolving it from liability.

[30] *Id.*, at 25b. One of the respondents awarded the most in damages, Barbara Ellis—a partner in Ellis Variety Store—testified that the store was boycotted from April 1, 1966, until January 27, 1967. On the latter date, the store agreed—apparently at the urging of a biracial committee—to hire a black cashier. Record 1183. The boycott was reimposed on April 17, 1968, after the death of Martin Luther King, Jr., but again was lifted on May 1, 1968. *Id.*, at 1184. The boycott finally was reimposed on April 19, 1969, the day following the shooting of Roosevelt Jackson. *Ibid.*

One event that occurred during the boycott is of particular significance. On April 18, 1969, a young black man named Roosevelt Jackson was shot and killed during an encounter with two Port Gibson police officers.[31] Large crowds immediately gathered, first at the hospital and later at the church. Tension in the community neared a breaking point. The local police requested reinforcements from the State Highway Patrol and sporadic acts of violence ensued. The Mayor and Board of Aldermen placed a dawn-to-dusk curfew into effect.

On April 19, Charles Evers spoke to a group assembled at the First Baptist Church and led a march to the courthouse where he demanded the discharge of the entire Port Gibson Police Force. When this demand was refused, the boycott was reimposed on all white merchants. One of Evers' speeches on this date was recorded by the police. In that speech—significant portions of which are reproduced in an Appendix to this opinion—Evers stated that boycott violators would be "disciplined" by their own people and warned that the Sheriff could not sleep with boycott violators at night.

On April 20, Aaron Henry came to Port Gibson, spoke to a large gathering, urged moderation, and joined local leaders in a protest march and a telegram sent to the Attorney General of the United States. On April 21, Evers gave another speech to several hundred people, in which he again called for a discharge of the police force and for a total boycott of all white-owned businesses in Claiborne County. Although this speech was not recorded, the chancellor found that Evers stated: "If we catch any of you going in any of them racist stores, we're gonna break your damn neck."[32]

As noted, this lawsuit was filed in October 1969. No significant events concerning the boycott occurred after that

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[31] The officers had gone to Jackson's home to arrest him. A scuffle ensued and Jackson was shot by a white officer allegedly while being held by a black officer.

[32] App. to Pet. for Cert. 27b.

time. The chancellor identified no incident of violence that occurred after the suit was brought. He did identify, however, several significant incidents of boycott-related violence that occurred some years earlier.

Before describing that evidence, it is appropriate to note that certain practices generally used to encourage support for the boycott were uniformly peaceful and orderly. The few marches associated with the boycott were carefully controlled by black leaders. Pickets used to advertise the boycott were often small children. The police made no arrests—and no complaints are recorded—in connection with the picketing and occasional demonstrations supporting the boycott. Such activity was fairly irregular, occurred primarily on weekends, and apparently was largely discontinued around the time the lawsuit was filed.[33]

One form of "discipline" of black persons who violated the boycott appears to have been employed with some regularity. Individuals stood outside of boycotted stores and identified those who traded with the merchants. Some of these "store watchers" were members of a group known as the "Black Hats" or the "Deacons."[34] The names of persons who vio-

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[33] Record 1146. The Sheriff of Claiborne County testified: "There were pickets off and on from April, 1966 to 1970." *Id.*, at 1060. When asked to describe "how they conducted themselves, what they did, what they went about doing," he stated: "Most of them carried or either had signs on their shoulders and they walked up and down the streets in front of the stores. They wouldn't always picket the same stores at the same time. At different times they might picket M&M then they would move up and picket Claiborne Hardware down Market Street to other businesses. Most of the time it was teenagers and at the last it was little bitty fellows, as young as about six years old. That was '69 and '70." *Ibid.* The Sheriff also testified that the boycott was "tight" in April 1966, April 1968, and April 1969. *Id.*, at 1152.

[34] Evidence concerning the aims and practices of the "Black Hats" is contradictory. Respondents describe them as a "paramilitary organization." Petitioner Elmo Scott, a member of the group, testified concerning instructions that were given to him: "It was given to the Deacons to give respect to the people that was on the street and, regardless of what they say back to you, for you not to use bad language to them or not to curse

lated the boycott were read at meetings of the Claiborne County NAACP and published in a mimeographed paper entitled the "Black Times." As stated by the chancellor, those persons "were branded as traitors to the black cause, called demeaning names, and socially ostracized for merely trading with whites."[35]

The chancellor also concluded that a quite different form of discipline had been used against certain violators of the boycott. He specifically identified 10 incidents that "strikingly" revealed the "atmosphere of fear that prevailed among blacks from 1966 until 1970."[36] The testimony concerning four incidents convincingly demonstrates that they occurred because the victims were ignoring the boycott. In two cases, shots were fired at a house; in a third, a brick was thrown through a windshield; in the fourth, a flower garden was damaged. None of these four victims, however, ceased trading with white merchants.[37]

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them or no kind of way, just talk to them in the right manner of way." *Id.*, at 2985. It is undisputed that the "Black Hats" were formed during the boycott, that members of the organization engaged in "store watching" and other "enforcement" activities, and that some individuals who belonged to the group committed acts of violence.

[35] App. to Pet. for Cert. 19b.

[36] *Id.*, at 35b.

[37] On August 22, 1966, birdshot was fired into the home of James Gilmore, a black man who ignored the boycott. He immediately grabbed a shotgun, leapt into his car, pursued the vehicle from which he believed the shots had come, forced it to the side of the road, and apprehended three young black men who were active supporters of the boycott. They were indicted, tried, and convicted, but the convictions were set aside on appeal. *Whitney* v. *State*, 205 So. 2d 284 (Miss. 1967). Gilmore continued to patronize white merchants after the incident.

In June 1966, while Murriel Cullens was having a beer in Wolf's Store, a brick was thrown through the windshield of his parked car. He had been patronizing white merchants and continued to do so thereafter. Record 14049. In November 1966, shotgun pellets were fired into the wall of his mother's home. She had received a number of threatening telephone calls criticizing her for patronizing white stores. She continued to do so after the incident. *Id.*, at 14003. At trial, Laura Cullens testified, in response

The evidence concerning four other incidents is less clear, but again it indicates that an unlawful form of discipline was applied to certain boycott violators. In April 1966, a black couple named Cox asked for a police escort to go into a white-owned dry cleaner and, a week later, shots were fired into their home. In another incident, an NAACP member took a bottle of whiskey from a black man who had purchased it in a white-owned store. The third incident involved a fight between a commercial fisherman who did not observe the boycott and four men who "grabbed me and beat me up and took a gun off me."[38] In a fourth incident, described only in hearsay testimony, a group of young blacks apparently pulled down the overalls of an elderly brick mason known as "Preacher White" and spanked him for not observing the boycott.[39]

Two other incidents discussed by the chancellor are of less certain significance. Jasper Coleman testified that he par-

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to a question whether she had been scared: "No indeed. I haven't had a bone in me scared in my life from nobody. And I have always told them, they say, 'You're just an uncle tom.' And I say, 'Well, uncle tom can be blue, black, green or purple or white. If I feel I am in the right, I stand in that right and nobody tells me what to do.'" *Id.*, at 14017.

James Bailey, who was a teenager at the time of the incident, testified that he had noticed that an elderly black lady named Willie Butler traded with a white merchant and had groceries delivered to her home. He testified that he destroyed flowers in her garden to punish her for violating the boycott. *Id.*, at 3656. He stated that he acted on his own initiative and that Mrs. Butler continued to trade with the merchant. *Id.*, at 3660, 3741.

[38] *Id.*, at 13868. One of his assailants testified that the incident resulted from an automobile accident, rather than the boycott. *Id.*, at 3656.

[39] "Preacher White" had died by the time of trial. No witness admitted being present at what respondents' counsel characterized as "the spanking of Preacher White." *Id.*, at 3696. The Port Gibson Chief of Police testified, however, that White had come in and complained that a group of young blacks had pulled his overalls down and whipped him. *Id.*, at 2176. In describing this incident, the chancellor stated that Preacher White "was stripped of his clothing and whipped by a group of young blacks because he refused to honor the boycott." App. to Pet. for Cert. 37b.

ticipated in an all-night poker game at a friend's house on Christmas Eve 1966. The following morning he discovered that all four tires of his pickup truck had been slashed with a knife. Coleman testified that he did not participate in the boycott but was never threatened for refusing to do so. Record 13791. Finally, Willie Myles testified that he and his wife received a threatening phone call and that a boy on a barge told him that he would be whipped for buying his gas at the wrong place.

Five of these incidents occurred in 1966. The other five are not dated. The chancellor thus did not find that any act of violence occurred after 1966.[40] In particular, he made no reference to any act of violence or threat of violence—with the exception, of course, of Charles Evers' speeches—after the shootings of Martin Luther King, Jr., in 1968 or Roosevelt Jackson in 1969. The chancellor did not find that any of the incidents of violence was discussed at the Tuesday evening meetings of the NAACP.[41]

## II

This Court's jurisdiction to review the judgment of the Mississippi Supreme Court is, of course, limited to the fed-

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[40] In describing the "atmosphere of fear" existing during the boycott, the chancellor emphasized the participation of petitioner Rudy Shields. He stated:

"Defendant Rudolph J. (Rudy) Shields, formerly of Chicago, was the principal figure in several altercations. He boasted that he was 'the most jailed person in the Claiborne County boycott.' This man was the acknowledged leader of the 'Deacons.'" *Id.*, at 35b.

See also Supplemental Brief for Respondents 10–13. The record indicates that Shields was in Port Gibson for approximately eight months during 1966. Record 4993.

[41] The chancellor did find—and apparently believed this fact to be significant—that the NAACP provided attorneys to black persons arrested in connection with acts arising from the boycott. App. to Pet. for Cert. 38b. The NAACP provided legal representation to the three black persons arrested in August 1966 following the Gilmore shooting.

eral questions necessarily decided by that court.[42] We consider first whether petitioners' activities are protected in any respect by the Federal Constitution and, if they are, what effect such protection has on a lawsuit of this nature.

A

The boycott of white merchants at issue in this case took many forms. The boycott was launched at a meeting of a local branch of the NAACP attended by several hundred persons. Its acknowledged purpose was to secure compliance by both civic and business leaders with a lengthy list of demands for equality and racial justice. The boycott was supported by speeches and nonviolent picketing. Participants repeatedly encouraged others to join in its cause.

Each of these elements of the boycott is a form of speech or conduct that is ordinarily entitled to protection under the First and Fourteenth Amendments.[43] The black citizens named as defendants in this action banded together and collectively expressed their dissatisfaction with a social structure that had denied them rights to equal treatment and respect. As we so recently acknowledged in *Citizens Against Rent Control/Coalition for Fair Housing* v. *Berkeley*, 454 U. S. 290, 294, "the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process." We recognized that "by collective effort individuals can make their views known, when, individually, their voices would be faint

[42] Although the Mississippi Supreme Court remanded for a recomputation of damages, its judgment is final for purposes of our jurisdiction. See *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 480.

[43] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U. S. Const., Amdt. 1. First Amendment freedoms are protected by the Fourteenth Amendment from invasion by the States. *Edwards* v. *South Carolina*, 372 U. S. 229, 235.

or lost." *Ibid.* In emphasizing "the importance of freedom of association in guaranteeing the right of people to make their voices heard on public issues," *id.*, at 295, we noted the words of Justice Harlan, writing for the Court in *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 460:

> "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly."

THE CHIEF JUSTICE stated for the Court in *Citizens Against Rent Control:* "There are, of course, some activities, legal if engaged in by one, yet illegal if performed in concert with others, but political expression is not one of them." 454 U. S., at 296.

The right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected. In *De Jonge* v. *Oregon*, 299 U. S. 353, the Court unanimously held that an individual could not be penalized simply for assisting in the conduct of an otherwise lawful meeting held under the auspices of the Communist Party, an organization that advocated "criminal syndicalism." After reviewing the rights of citizens "to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances," *id.*, at 364, Chief Justice Hughes, writing for the Court, stated:

> "It follows from these considerations that, consistently with the Federal Constitution, peaceable assembly for lawful discussion cannot be made a crime. The holding of meetings for peaceable political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals on that score. The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices

> under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects. If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge." *Id.*, at 365.

Of course, the petitioners in this case did more than assemble peaceably and discuss among themselves their grievances against governmental and business policy. Other elements of the boycott, however, also involved activities ordinarily safeguarded by the First Amendment. In *Thornhill* v. *Alabama*, 310 U. S. 88, the Court held that peaceful picketing was entitled to constitutional protection, even though, in that case, the purpose of the picketing "was concededly to advise customers and prospective customers of the relationship existing between the employer and its employees and thereby to induce such customers not to patronize the employer." *Id.*, at 99. Cf. *Chauffeurs* v. *Newell*, 356 U. S. 341. In *Edwards* v. *South Carolina*, 372 U. S. 229, we held that a peaceful march and demonstration was protected by the rights of free speech, free assembly, and freedom to petition for a redress of grievances.

Speech itself also was used to further the aims of the boycott. Nonparticipants repeatedly were urged to join the common cause, both through public address and through personal solicitation. These elements of the boycott involve speech in its most direct form. In addition, names of boycott violators were read aloud at meetings at the First Baptist Church and published in a local black newspaper. Petitioners admittedly sought to persuade others to join the boycott

through social pressure and the "threat" of social ostracism. Speech does not lose its protected character, however, simply because it may embarrass others or coerce them into action. As Justice Rutledge, in describing the protection afforded by the First Amendment, explained:

> "It extends to more than abstract discussion, unrelated to action. The First Amendment is a charter for government, not for an institution of learning. 'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts." *Thomas* v. *Collins*, 323 U. S. 516, 537.

In *Organization for a Better Austin* v. *Keefe*, 402 U. S. 415, the Court considered the validity of a prior restraint on speech that invaded the "privacy" of the respondent. Petitioner, a racially integrated community organization, charged that respondent, a real estate broker, had engaged in tactics known as "blockbusting" or "panic peddling."[44] Petitioner asked respondent to sign an agreement that he would not solicit property in their community. When he refused, petitioner distributed leaflets near respondent's home that were critical of his business practices.[45] A state court enjoined petitioner from distributing the leaflets; an appellate court affirmed on the ground that the alleged activities were coercive and intimidating, rather than informative, and therefore not entitled to First Amendment protection. *Id.*, at 418. This Court reversed. THE CHIEF JUSTICE explained:

> "This Court has often recognized that the activity of peaceful pamphleteering is a form of communication pro-

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[44] Specifically, petitioner contended that respondent "aroused the fears of the local white residents that Negroes were coming into the area and then, exploiting the reactions and emotions so aroused, was able to secure listings and sell homes to Negroes." 402 U. S., at 416.

[45] One of petitioner's officers testified at trial that he had hoped that respondent would be induced to sign the no-solicitation agreement by letting "his neighbors know what he was doing to us." *Id.*, at 417.

tected by the First Amendment. *E. g., Martin* v. *City of Struthers*, 319 U. S. 141 (1943); *Schneider* v. *State*, 308 U. S. 147 (1939); *Lovell* v. *Griffin*, 303 U. S. 444 (1938). In sustaining the injunction, however, the Appellate Court was apparently of the view that petitioners' purpose in distributing their literature was not to inform the public, but to 'force' respondent to sign a no-solicitation agreement. The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. Petitioners plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper. See *Schneider* v. *State, supra; Thornhill* v. *Alabama*, 310 U. S. 88 (1940). Petitioners were engaged openly and vigorously in making the public aware of respondent's real estate practices. Those practices were offensive to them, as the views and practices of petitioners are no doubt offensive to others. But so long as the means are peaceful, the communication need not meet standards of acceptability." *Id.*, at 419.

In dissolving the prior restraint, the Court recognized that "offensive" and "coercive" speech was nevertheless protected by the First Amendment.[46]

In sum, the boycott clearly involved constitutionally protected activity. The established elements of speech, assembly, association, and petition, "though not identical, are inseparable." *Thomas* v. *Collins, supra*, at 530. Through exercise of these First Amendment rights, petitioners sought to bring about political, social, and economic change.

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[46] See *Watts* v. *United States*, 394 U. S. 705, 708 ("The language of the political arena, like the language used in labor disputes, see *Linn* v. *United Plant Guard Workers of America*, 383 U. S. 53, 58 (1966), is often vituperative, abusive, and inexact"). See also *Cohen* v. *California*, 403 U. S. 15; Farber, Commercial Speech and First Amendment Theory, 74 Nw. U. L. Rev. 372 (1979).

Through speech, assembly, and petition—rather than through riot or revolution—petitioners sought to change a social order that had consistently treated them as second-class citizens.

The presence of protected activity, however, does not end the relevant constitutional inquiry. Governmental regulation that has an incidental effect on First Amendment freedoms may be justified in certain narrowly defined instances. See *United States* v. *O'Brien*, 391 U. S. 367.[47] A nonviolent and totally voluntary boycott may have a disruptive effect on local economic conditions. This Court has recognized the strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech and association. See *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490; *NLRB* v. *Retail Store Employees*, 447 U. S. 607. The right of business entities to "associate" to suppress competition may be curtailed. *National Society of Professional Engineers* v. *United States*, 435 U. S. 679. Unfair trade practices may be restricted. Secondary boycotts and picketing by labor unions may be prohibited, as part of "Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife." *NLRB* v. *Retail Store Employees*, *supra*, at 617–618 (BLACKMUN, J., concurring in part). See *Longshoremen* v. *Allied International, Inc.*, 456 U. S. 212, 222–223, and n. 20.

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[47] "To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." 391 U. S., at 376–377 (footnotes omitted).

While States have broad power to regulate economic activity, we do not find a comparable right to prohibit peaceful political activity such as that found in the boycott in this case. This Court has recognized that expression on public issues "has always rested on the highest rung of the hierarchy of First Amendment values." *Carey* v. *Brown*, 447 U. S. 455, 467. "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana*, 379 U. S. 64, 74–75. There is a "profound national commitment" to the principle that "debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270.

In *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U. S. 127, the Court considered whether the Sherman Act prohibited a publicity campaign waged by railroads against the trucking industry that was designed to foster the adoption of laws destructive of the trucking business, to create an atmosphere of distaste for truckers among the general public, and to impair the relationships existing between truckers and their customers. Noting that the "right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms," the Court held that the Sherman Act did not proscribe the publicity campaign. *Id.*, at 137–138. The Court stated that it could not see how an intent to influence legislation to destroy the truckers as competitors "could transform conduct otherwise lawful into a violation of the Sherman Act." *Id.*, at 138–139. Noting that the right of the people to petition their representatives in government "cannot properly be made to depend on their intent in doing so," the Court held that "at least insofar as the railroads' campaign was directed toward obtaining governmental action, its legality was not at all affected by any anticompetitive purpose it may have had." *Id.*, at 139–140. This conclusion was not changed by the fact that the railroads' anticompetitive *purpose* produced an anti-

competitive *effect;* the Court rejected the truckers' Sherman Act claim despite the fact that "the truckers sustained some direct injury as an incidental effect of the railroads' campaign to influence governmental action." *Id.*, at 143.

It is not disputed that a major purpose of the boycott in this case was to influence governmental action. Like the railroads in *Noerr*, the petitioners certainly foresaw—and directly intended—that the merchants would sustain economic injury as a result of their campaign. Unlike the railroads in that case, however, the purpose of petitioners' campaign was not to destroy legitimate competition. Petitioners sought to vindicate rights of equality and of freedom that lie at the heart of the Fourteenth Amendment itself. The right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself.[48]

In upholding an injunction against the state supersedeas bonding requirement in this case, Judge Ainsworth of the Court of Appeals for the Fifth Circuit cogently stated:

> "At the heart of the Chancery Court's opinion lies the belief that the mere organization of the boycott and every activity undertaken in support thereof could be subject to judicial prohibition under state law. This

[48] In *NAACP* v. *Alabama ex rel. Flowers*, 377 U. S. 288, the Court unanimously rejected Alabama's effort to oust the NAACP from that State. The State claimed, in part, that the NAACP was " 'engaged in organizing, supporting and financing an illegal boycott' " of Montgomery's bus system. *Id.*, at 302. Writing for the Court, Justice Harlan described as "doubtful" the "assumption that an organized refusal to ride on Montgomery's buses in protest against a policy of racial segregation might, without more, in some circumstances violate a valid state law." *Id.*, at 307. In *Missouri* v. *National Organization for Women, Inc.*, 620 F. 2d 1301, 1317 (CA8 1980), cert. denied, 449 U. S. 842, Judge Stephenson stated that "the right to petition is of such importance that it is not an improper interference [under state tort law] even when exercised by way of a boycott."

> view accords insufficient weight to the First Amendment's protection of political speech and association. There is no suggestion that the NAACP, MAP or the individual defendants were in competition with the white businesses or that the boycott arose from parochial economic interests. On the contrary, the boycott grew out of a racial dispute with the white merchants and city government of Port Gibson and all of the picketing, speeches, and other communication associated with the boycott were directed to the elimination of racial discrimination in the town. This differentiates this case from a boycott organized for economic ends, for speech to protest racial discrimination is essential political speech lying at the core of the First Amendment." *Henry* v. *First National Bank of Clarksdale*, 595 F. 2d 291, 303 (1979) (footnote omitted).

We hold that the nonviolent elements of petitioners' activities are entitled to the protection of the First Amendment.[49]

B

The Mississippi Supreme Court did not sustain the chancellor's imposition of liability on a theory that state law prohibited a nonviolent, politically motivated boycott. The fact that such activity is constitutionally protected, however, imposes a special obligation on this Court to examine critically the basis on which liability was imposed.[50] In particular, we

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[49] We need not decide in this case the extent to which a narrowly tailored statute designed to prohibit certain forms of anticompetitive conduct or certain types of secondary pressure may restrict protected First Amendment activity. No such statute is involved in this case. Nor are we presented with a boycott designed to secure aims that are themselves prohibited by a valid state law. See *Hughes* v. *Superior Court*, 339 U. S. 460.

[50] "This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across 'the line between speech unconditionally guaranteed and speech which may

consider here the effect of our holding that much of petitioners' conduct was constitutionally protected on the ability of the State to impose liability for elements of the boycott that were not so protected.[51]

The First Amendment does not protect violence. "Certainly violence has no sanctuary in the First Amendment, and the use of weapons, gunpowder, and gasoline may not constitutionally masquerade under the guise of 'advocacy.'" *Samuels* v. *Mackell*, 401 U. S. 66, 75 (Douglas, J., concurring). Although the extent and significance of the violence in this case are vigorously disputed by the parties, there is no question that acts of violence occurred. No federal rule of law restricts a State from imposing tort liability for business losses that are caused by violence and by threats of violence. When such conduct occurs in the context of constitutionally protected activity, however, "precision of regulation" is demanded. *NAACP* v. *Button*, 371 U. S. 415, 438.[52] Specifically, the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to

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legitimately be regulated.' *Speiser* v. *Randall*, 357 U. S. 513, 525. In cases where that line must be drawn, the rule is that we 'examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.' *Pennekamp* v. *Florida*, 328 U. S. 331, 335; see also *One, Inc.* v. *Olesen*, 355 U. S. 371; *Sunshine Book Co.* v. *Summerfield*, 355 U. S. 372. We must 'make an independent examination of the whole record,' *Edwards* v. *South Carolina*, 372 U. S. 229, 235, so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 285.

[51] Although this is a civil lawsuit between private parties, the application of state rules of law by the Mississippi state courts in a manner alleged to restrict First Amendment freedoms constitutes "state action" under the Fourteenth Amendment. *New York Times Co.* v. *Sullivan*, *supra*, at 265.

[52] See also *Carroll* v. *Princess Anne*, 393 U. S. 175, 184; *Keyishian* v. *Board of Regents*, 385 U. S. 589, 604.

damages liability and on the persons who may be held accountable for those damages.

In *Mine Workers* v. *Gibbs*, 383 U. S. 715, the Court considered a case in many respects similar to the one before us. The case grew out of the rivalry between the United Mine Workers (UMW) and the Southern Labor Union (SLU) over representation of workers in the southern Appalachian coal fields. A coal company laid off 100 miners of UMW's Local 5881 when it closed one of its mines. That same year, a subsidiary of the coal company hired Gibbs as mine superintendent to attempt to open a new mine on nearby property through use of members of the SLU. Gibbs also received a contract to haul the mine's coal to the nearest railroad loading point. When he attempted to open the mine, however, he was met by armed members of Local 5881 who threatened Gibbs and beat an SLU organizer. These incidents occurred on August 15 and 16. Thereafter, there was no further violence at the mine site and UMW members maintained a peaceful picket line for nine months. No attempts to open the mine were made during that period.

Gibbs lost his job as superintendent and never began performance of the haulage contract. Claiming to have suffered losses as a result of the union's concerted plan against him, Gibbs filed suit in federal court against the international UMW. He alleged an unlawful secondary boycott under the federal labor laws and, as a pendent state-law claim, "an unlawful conspiracy and an unlawful boycott aimed at him . . . to maliciously, wantonly and willfully interfere with his contract of employment and with his contract of haulage." *Id.*, at 720. The federal claim was dismissed on the ground that the dispute was "primary" and therefore not cognizable under the federal prohibition of secondary labor boycotts. Damages were awarded against the UMW, however, on the state claim of interference with an employment relationship.

This Court reversed. The Court found that the pleadings, arguments of counsel, and jury instructions had not ade-

quately defined the compass within which damages could be awarded under state law. The Court noted that it had "consistently recognized the right of States to deal with violence and threats of violence appearing in labor disputes" and had sustained "a variety of remedial measures against the contention that state law was pre-empted by the passage of federal labor legislation." *Id.*, at 729. To accommodate federal labor policy, however, the Court in *Gibbs* held: "the permissible scope of state remedies in this area is strictly confined to the direct consequences of such [violent] conduct, and does not include consequences resulting from associated peaceful picketing or other union activity." *Ibid.* The Court noted that in *Construction Workers* v. *Laburnum Construction Corp.*, 347 U. S. 656, damages were restricted to those directly and proximately caused by wrongful conduct chargeable to the defendants. "'Thus there [was] nothing in the measure of damages to indicate that state power was exerted to compensate for anything more than the direct consequences of the violent conduct.'" 383 U. S., at 730 (quoting *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 249, n. 6).

The careful limitation on damages liability imposed in *Gibbs* resulted from the need to accommodate state law with federal labor policy. That limitation is no less applicable, however, to the important First Amendment interests at issue in this case. Petitioners withheld their patronage from the white establishment of Claiborne County to challenge a political and economic system that had denied them the basic rights of dignity and equality that this country had fought a Civil War to secure. While the State legitimately may impose damages for the consequences of violent conduct, it may not award compensation for the consequences of nonviolent, protected activity. Only those losses proximately caused by unlawful conduct may be recovered.

The First Amendment similarly restricts the ability of the State to impose liability on an individual solely because of his

association with another. In *Scales* v. *United States*, 367 U. S. 203, 229, the Court noted that a "blanket prohibition of association with a group having both legal and illegal aims" would present "a real danger that legitimate political expression or association would be impaired." The Court suggested that to punish association with such a group, there must be "clear proof that a defendant 'specifically intend[s] to accomplish [the aims of the organization] by resort to violence.'" *Ibid.* (quoting *Noto* v. *United States*, 367 U. S. 290, 299).[53] Moreover, in *Noto* v. *United States* the Court emphasized that this intent must be judged "according to the strictest law,"[54] for "otherwise there is a danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share." *Id.*, at 299–300.

In *Healy* v. *James*, 408 U. S. 169, the Court applied these principles in a noncriminal context. In that case the Court held that a student group could not be denied recognition at a state-supported college merely because of its affiliation with a national organization associated with disruptive and violent campus activity. It noted that "the Court has consistently disapproved governmental action imposing criminal sanctions or denying rights and privileges solely because of a citizen's association with an unpopular organization." *Id.*, at 185–186. The Court stated that "it has been established that 'guilt by association alone, without [establishing] that an individual's association poses the threat feared by the Government,' is an impermissible basis upon which to deny First Amendment rights." *Id.*, at 186 (quoting *United States* v. *Robel*, 389 U. S. 258, 265). "The government has the bur-

[53] See *United States* v. *Robel*, 389 U. S. 258; *Elfbrandt* v. *Russell*, 384 U. S. 11; *Aptheker* v. *Secretary of State*, 378 U. S. 500.

[54] "*Strictissimi juris.*" 367 U. S., at 299.

den of establishing a knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims." 408 U. S., at 186 (footnote omitted).[55]

The principles announced in *Scales*, *Noto*, and *Healy* are relevant to this case. Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims.[56] "In this sensitive field, the State may not employ 'means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' *Shelton* v. *Tucker*, 364 U. S. 479, 488 (1960)." *Carroll* v. *Princess Anne*, 393 U. S. 175, 183–184.

## III

The chancellor awarded respondents damages for all business losses that were sustained during a 7-year period beginning in 1966 and ending December 31, 1972.[57] With the ex-

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[55] In *Rizzo* v. *Goode*, 423 U. S. 362, the Court vacated an injunction, directed against an entire police department, that had resulted from 20 specific incidents of police misconduct. The Court held that such collective responsibility should be limited to instances in which a concerted design existed to accomplish a wrongful objective. *Id.*, at 373–376.

[56] Of course, the question whether an individual may be held liable for damages merely by reason of his association with others who committed unlawful acts is quite different from the question whether an individual may be held liable for unlawful conduct that he himself authorized or incited. See *infra*, at 925–926.

[57] It is noteworthy that the portion of the chancellor's opinion discussing damages begins by referring expressly to the two theories of liability that the Mississippi Supreme Court rejected:

"The complainants proved, in this record, that they suffered injury to their respective businesses as the direct and proximate result of the unlawful secondary boycott and the defendants' actions in restraining trade, all of

ception of Aaron Henry, all defendants were held jointly and severally liable for these losses. The chancellor's findings were consistent with his view that voluntary participation in the boycott was a sufficient basis on which to impose liability. The Mississippi Supreme Court properly rejected that theory; it nevertheless held that petitioners were liable for all damages "resulting from the boycott."[58] In light of the principles set forth above, it is evident that such a damages award may not be sustained in this case.

The opinion of the Mississippi Supreme Court itself demonstrates that all business losses were not proximately caused by the violence and threats of violence found to be present. The court stated that "coercion, intimidation, and threats" formed "*part* of the boycott activity" and "*contributed* to its almost complete success."[59] The court broadly asserted—without differentiation—that "'[i]ntimidation, threats, social ostracism, vilification, and traduction'" were devices used by the defendants to effectuate the boycott.[60] The court repeated the chancellor's finding that "the volition of *many* black persons was overcome out of sheer fear."[61] These findings are inconsistent with the court's imposition of all damages "resulting from the boycott." To the extent that the court's judgment rests on the ground that "many" black citizens were "intimidated" by "threats" of "social ostracism, vilification, and traduction," it is flatly inconsistent with the First Amendment. The ambiguous findings of the Mississippi Supreme Court are inadequate to assure the "precision of regulation" demanded by that constitutional provision.

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which was accomplished by defendants through a conspiracy." App. to Pet. for Cert. 57b (footnote omitted).

In a footnote, the chancellor added that "any kind of boycott is unlawful if executed with force or violence or threats." *Id.*, at 57b, n. 21.

[58] 393 So. 2d, at 1307.

[59] *Id.*, at 1302 (emphasis added).

[60] *Id.*, at 1300 (quoting trial court; see App. to Pet. for Cert. 39b).

[61] 393 So. 2d, at 1300 (emphasis added).

The record in this case demonstrates that all of respondents' losses were not proximately caused by violence or threats of violence. As respondents themselves stated at page 12 of their brief in the Mississippi Supreme Court:

> "Most of the witnesses testified that they voluntarily went along with the NAACP and their fellow black citizens in honoring and observing the boycott because they wanted the boycott."

This assessment is amply supported by the record.[62] It is indeed inconceivable that a boycott launched by the unanimous vote of several hundred persons succeeded solely through fear and intimidation. Moreover, the fact that the boycott "intensified" following the shootings of Martin Luther King, Jr., and Roosevelt Jackson demonstrates that factors other than force and violence (by the petitioners) figured

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[62] The testimony of Julia Johnson—although itself only a small portion of a massive record—perhaps best illustrates this point:

"Q. How did you observe the boycott?

"A. I just stayed out of the stores, because I had my own personal reasons to stay out of the stores. There were some things I really wanted, and the things I wanted were the right to vote, the right to have a title—Mrs. or Mr. or whatever I am, and not uncle or aunt, boy or girl. So that's what I wanted. And if I wanted a job—a qualified job, I wanted to have the opportunity to be hired. Not hired because I'm black or white, but just hired.

"Q. And this was your reason for observing the boycott?

"A. Yes, it was.

"Q. And you were in favor of the boycott?

"A. Yes, I was in favor of the boycott.

"Q. And it wasn't because somebody threatened you?

"A. No, it wasn't because nobody threatened me.

"Q. You weren't afraid?

"A. Was I afraid?

"Q. Yes.

"A. No, I was not afraid." Record 15476.

It is clear that losses were sustained because persons like Julia Johnson "wanted justice and equal opportunity." *Id.*, at 6864 (testimony of Margaret Liggins). See *id.*, at 6737, 12419, 13543–13544.

prominently in the boycott's success. The chancellor made no finding that any act of violence occurred after 1966. While the timing of the acts of violence was not important to the chancellor's imposition of liability, it is a critical factor under the narrower rationale of the Mississippi Supreme Court. That court has completely failed to demonstrate that business losses suffered in 1972—three years after this lawsuit was filed—were proximately caused by the isolated acts of violence found in 1966.[63] It is impossible to conclude that state power has not been exerted to compensate respondents for the direct consequences of nonviolent, constitutionally protected activity.

This case is not like *Milk Wagon Drivers* v. *Meadowmoor Dairies, Inc.*, 312 U. S. 287, in which the Court held that the presence of violence justified an injunction against both violent and nonviolent activity.[64] The violent conduct present in that case was pervasive.[65] The Court in *Meadowmoor* stated that "utterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force." *Id.*, at 293. The Court emphasized, however:

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[63] It is also noteworthy that virtually every victim of the acts of violence found by the chancellor testified that he or she continued to patronize the white merchants. See *supra*, at 904, and n. 37.

[64] In *Mine Workers* v. *Gibbs*, 383 U. S. 715, the Court stated that if "special facts" such as those presented in *Meadowmoor* "appeared in an action for damages after picketing marred by violence had occurred," they might "support the conclusion that all damages resulting from the picketing were proximately caused by its violent component or by the fear which that violence engendered." 383 U. S., at 731–732.

[65] As described by the Court: "Witnesses testified to more than fifty instances of windowsmashing; explosive bombs caused substantial injury to the plants of Meadowmoor and another dairy using the vendor system and to five stores; stench bombs were dropped in five stores; three trucks of vendors were wrecked, seriously injuring one driver, and another was driven into a river; a store was set on fire and in large measure ruined; two trucks of vendors were burned; a storekeeper and a truck driver were severely beaten; workers at a dairy which, like Meadowmoor, used the ven-

> "Still it is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality. That is why this Court has the ultimate power to search the records in the state courts where a claim of constitutionality is effectively made. And so the right of free speech cannot be denied by drawing from a trivial rough incident or a moment of animal exuberance the conclusion that otherwise peaceful picketing has the taint of force." *Ibid.*

Such "insubstantial findings" were not present in *Meadowmoor*. But in this case, the Mississippi Supreme Court has relied on isolated acts of violence during a limited period to uphold respondents' recovery of *all* business losses sustained over a 7-year span. No losses are attributed to the voluntary participation of individuals determined to secure "justice and equal opportunity."[66] The court's judgment "screens reality" and cannot stand.[67]

Respondents' supplemental brief also demonstrates that on the present record no judgment may be sustained against most of the petitioners. Regular attendance and participation at the Tuesday meetings of the Claiborne County Branch of the NAACP is an insufficient predicate on which to impose liability. The chancellor's findings do not suggest that any illegal conduct was authorized, ratified, or even discussed at any of the meetings. The Sheriff testified that he was kept

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dor system were held with guns and severely beaten about the head while being told 'to join the union'; carloads of men followed vendors' trucks, threatening the drivers, and in one instance shot at the truck and driver." 312 U. S., at 291–292.

[66] See n. 62, *supra*.

[67] For the same reasons, the permanent injunction entered by the chancellor must be dissolved. Since the boycott apparently has ended, the Mississippi Supreme Court may wish to vacate the entire injunction on the ground that it is no longer necessary; alternatively, the injunction must be modified to restrain only unlawful conduct and the persons responsible for conduct of that character.

informed of what transpired at the meetings; he made no reference to any discussion of unlawful activity.[68] To impose liability for presence at weekly meetings of the NAACP would—ironically—not even constitute "guilt by association," since there is no evidence that the association possessed unlawful aims. Rather, liability could only be imposed on a "guilt *for* association" theory. Neither is permissible under the First Amendment.[69]

Respondents also argue that liability may be imposed on individuals who were either "store watchers" or members of the "Black Hats." There is nothing unlawful in standing outside a store and recording names. Similarly, there is nothing unlawful in wearing black hats, although such apparel may cause apprehension in others. As established above, mere association with either group—absent a specific intent to further an unlawful aim embraced by that group—is

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[68] See Record 1172. The strongest evidence of wrongdoing at the meetings was presented by petitioner Marjorie Brandon, who served at times as the local NAACP secretary. She testified that "in the meetings there were statements saying that you would be dealt with" if found trading in boycotted stores. *Id.*, at 5637. She stated that she understood "dealt with" to mean "they would take care of you, do something to you, if you were caught going in." *Ibid.* Her testimony does not disclose who made the statements, how often they were made, or that they were in any way endorsed by others at the meetings. A massive damages judgment may not be sustained on the basis of this testimony; the fact that certain anonymous persons made such statements at some point during a 7-year period is insufficient to establish that the Association itself possessed unlawful aims or that any petitioner specifically intended to further an unlawful goal.

[69] A legal duty to "repudiate"—to disassociate oneself from the acts of another—cannot arise unless, absent the repudiation, an individual could be found liable for those acts. As our decisions in *Scales*, *Noto*, and *Healy* make clear, see *supra*, at 920, civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. The chancellor in this case made no finding that the individuals who committed those acts of violence were "agents" or "servants" of those who attended the NAACP meetings; certainly such a relationship cannot be found simply because both shared certain goals. Cf. *General Building Contractors Assn.* v. *Pennsylvania*, *ante*, at 391–395.

an insufficient predicate for liability. At the same time, the evidence does support the conclusion that some members of each of these groups engaged in violence or threats of violence. Unquestionably, these individuals may be held responsible for the injuries that they caused; a judgment tailored to the consequences of their unlawful conduct may be sustained.

Respondents have sought separately to justify the judgment entered against Charles Evers and the national NAACP. As set forth by the chancellor, Evers was specially connected with the boycott in four respects. First, Evers signed the March 23 supplemental demand letter and unquestionably played the primary leadership role in the organization of the boycott. Second, Evers participated in negotiations with MAP and successfully convinced MAP to abandon its practice of purchasing food alternately from white-owned and black-owned stores. Third, he apparently presided at the April 1, 1966, meeting at which the vote to begin the boycott was taken; he delivered a speech to the large audience that was gathered on that occasion. See n. 28, *supra*. Fourth, Evers delivered the speeches on April 19 and 21, 1969, which we have discussed previously. See *supra*, at 902; Appendix to this opinion.

For the reasons set forth above, liability may not be imposed on Evers for his presence at NAACP meetings or his active participation in the boycott itself. To the extent that Evers caused respondents to suffer business losses through his organization of the boycott, his emotional and persuasive appeals for unity in the joint effort, or his "threats" of vilification or social ostracism, Evers' conduct is constitutionally protected and beyond the reach of a damages award. Respondents point to Evers' speeches, however, as justification for the chancellor's damages award. Since respondents would impose liability on the basis of a public address—which predominantly contained highly charged political rhetoric

lying at the core of the First Amendment—we approach this suggested basis of liability with extreme care.

There are three separate theories that might justify holding Evers liable for the unlawful conduct of others. First, a finding that he authorized, directed, or ratified specific tortious activity would justify holding him responsible for the consequences of that activity. Second, a finding that his public speeches were likely to incite lawless action could justify holding him liable for unlawful conduct that in fact followed within a reasonable period. Third, the speeches might be taken as evidence that Evers gave other specific instructions to carry out violent acts or threats.

While many of the comments in Evers' speeches might have contemplated "discipline" in the permissible form of social ostracism, it cannot be denied that references to the possibility that necks would be broken and to the fact that the Sheriff could not sleep with boycott violators at night implicitly conveyed a sterner message. In the passionate atmosphere in which the speeches were delivered, they might have been understood as inviting an unlawful form of discipline or, at least, as intending to create a fear of violence whether or not improper discipline was specifically intended.

It is clear that "fighting words"—those that provoke immediate violence—are not protected by the First Amendment. *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572. Similarly, words that create an immediate panic are not entitled to constitutional protection. *Schenck* v. *United States*, 249 U. S. 47.[70] This Court has made clear, however, that mere *advocacy* of the use of force or violence does not remove speech from the protection of the First Amendment. In *Brandenburg* v. *Ohio*, 395 U. S. 444, we reversed the conviction of a Ku Klux Klan leader for threatening "revengeance" if the "suppression" of the white race continued; we relied on

[70] "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." 249 U. S., at 52.

"the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.*, at 447. See *Noto* v. *United States*, 367 U. S., at 297–298 ("the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action"). See also *Whitney* v. *California*, 274 U. S. 357, 372 (Brandeis, J., concurring).

The emotionally charged rhetoric of Charles Evers' speeches did not transcend the bounds of protected speech set forth in *Brandenburg*. The lengthy addresses generally contained an impassioned plea for black citizens to unify, to support and respect each other, and to realize the political and economic power available to them. In the course of those pleas, strong language was used. If that language had been followed by acts of violence, a substantial question would be presented whether Evers could be held liable for the consequences of that unlawful conduct. In this case, however—with the possible exception of the Cox incident—the acts of violence identified in 1966 occurred weeks or months after the April 1, 1966, speech; the chancellor made no finding of any violence after the challenged 1969 speech. Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech. To rule otherwise would ignore the "profound national commitment" that "debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, 376 U. S., at 270.[71]

[71] In *Watts* v. *United States*, 394 U. S. 705, the petitioner was convicted of willfully making a threat to take the life of the President. During a pub-

For these reasons, we conclude that Evers' addresses did not exceed the bounds of protected speech. If there were other evidence of his authorization of wrongful conduct, the references to discipline in the speeches could be used to corroborate that evidence. But any such theory fails for the simple reason that there is no evidence—apart from the speeches themselves—that Evers authorized, ratified, or directly threatened acts of violence.[72] The chancellor's findings are not sufficient to establish that Evers had a duty to "repudiate" the acts of violence that occurred.[73] The findings are constitutionally inadequate to support the damages judgment against him.

The liability of the NAACP derived solely from the liability of Charles Evers.[74] The chancellor found:

> "The national NAACP was well-advised of Evers' actions, and it had the option of repudiating his acts or ratifying them. It never repudiated those acts, and therefore, it is deemed by this Court to have affirmed them." App. to Pet. for Cert. 42b–43b.

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lic rally at the Washington Monument, petitioner stated in a small discussion group:

"'They always holler at us to get an education. And now I have already received my draft classification as 1–A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L. B. J.'" *Id.*, at 706.

This Court summarily reversed. The Court agreed with the petitioner that the statement, taken in context, was "a kind of very crude offensive method of stating a political opposition to the President." *Id.*, at 708.

[72] There is evidence that Evers occasionally served as a "store watcher," but there is no suggestion that anything improper occurred on those occasions.

[73] See n. 69, *supra*.

[74] Indeed it is noteworthy that Aaron Henry—who was president of the Mississippi State Conference of the NAACP, president of the Coahoma County Branch of the NAACP, and a member of the Board of Directors of the national NAACP—was the only defendant dismissed by the chancellor on the merits.

Of course, to the extent that Charles Evers' acts are insufficient to impose liability upon him, they may not be used to impose liability on his principal. On the present record, however, the judgment against the NAACP could not stand in any event.

The associational rights of the NAACP and its members have been recognized repeatedly by this Court.[75] The NAACP—like any other organization—of course may be held responsible for the acts of its agents throughout the country that are undertaken within the scope of their actual or apparent authority.[76] Cf. *American Society of Mechanical Engineers, Inc.* v. *Hydrolevel Corp.*, 456 U. S. 556. Moreover, the NAACP may be found liable for other conduct of which it had knowledge and specifically ratified.

The chancellor made no finding that Charles Evers or any other NAACP member had either actual or apparent authority to commit acts of violence or to threaten violent conduct. The evidence in the record suggests the contrary. Aaron Henry, President of the Mississippi State Conference of the NAACP and a member of the Board of Directors of the national organization, testified that the statements attributed to Evers were directly contrary to NAACP policy. Record 4930.[77] Similarly, there is no evidence that the NAACP rati-

[75] Cf. *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449; *Bates* v. *Little Rock*, 361 U. S. 516; *Louisiana ex rel. Gremillion* v. *NAACP*, 366 U. S. 293; *NAACP* v. *Button*, 371 U. S. 415; *Gibson* v. *Florida Legislative Investigation Committee*, 372 U. S. 539; *NAACP* v. *Alabama ex rel. Flowers*, 377 U. S. 288.

[76] There is no question that Charles Evers—as its only paid representative in Mississippi—was an agent of the NAACP.

[77] In a footnote to his discussion of the NAACP's liability, the chancellor wrote:

"Aaron E. Henry, a prominent black leader in the State of Mississippi, who was president of the Mississippi State Conference of the NAACP, president of the Coahoma County Branch of the NAACP, and a member of the Board of Directors of the national NAACP, testified that the NAACP 'absolutely did not approve of the way the boycott was being conducted in Port Gibson.' There is also evidence in the record tending to show that

fied—or even had specific knowledge of—any of the acts of violence or threats of discipline associated with the boycott. Henry testified that the NAACP never authorized, and never considered taking, any official action with respect to the boycott. *Id.*, at 4896. The NAACP supplied no financial aid to the boycott. *Id.*, at 4940. The chancellor made no finding that the national organization was involved in any way in the boycott.[78]

To impose liability without a finding that the NAACP authorized—either actually or apparently—or ratified unlawful conduct would impermissibly burden the rights of political association that are protected by the First Amendment. As Justice Douglas noted in *NAACP* v. *Overstreet*, 384 U. S. 118, dissenting from a dismissal of a writ of certiorari found to have been improvidently granted:

> "To equate the liability of the national organization with that of the Branch in the absence of any proof that the national authorized or ratified the misconduct in question could ultimately destroy it. The rights of political association are fragile enough without adding the

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Evers was called to account by the national NAACP because of the manner in which the boycott was conducted. However, the NAACP took no action whatever to curb Evers' activities in this connection." App. to Pet. for Cert. 42b, n. 9.

Henry's testimony concerning Evers' having been "called to account by the National NAACP" concerned Evers' failure to make proper reports and Henry's understanding that there was a personality clash between Evers and an executive of the NAACP. Record 4905, 4907. We have found no evidence in the record that any representative of the national NAACP was advised of any facts concerning the manner in which the Port Gibson boycott was conducted.

[78] The chancellor did find that the NAACP had posted bond and provided legal representation for arrested boycott violators. Since the NAACP regularly provides such assistance to indigent black persons throughout the country, this finding cannot support a determination that the national organization was aware of, and ratified, unauthorized violent conduct. Counsel for respondents does not contend otherwise.

> additional threat of destruction by lawsuit. We have not been slow to recognize that the protection of the First Amendment bars subtle as well as obvious devices by which political association might be stifled. See *Bates* v. *Little Rock*, 361 U. S. 516, 523. Thus we have held that forced disclosure of one's political associations is, at least in the absence of a compelling state interest, inconsistent with the First Amendment's guaranty of associational privacy. *E. g.*, *DeGregory* v. *New Hampshire*, 383 U. S. 825; *Gibson* v. *Florida Legislative Comm.*, 372 U. S. 539, 543–546; *Shelton* v. *Tucker*, 364 U. S. 479; *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449, 462–463. Recognizing that guilt by association is a philosophy alien to the traditions of a free society (see *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 245–246, and the First Amendment itself, we have held that civil or criminal disabilities may not be imposed on one who joins an organization which has among its purposes the violent overthrow of the Government, unless the individual joins knowing of the organization's illegal purposes (*Wieman* v. *Updegraff*, 344 U. S. 183) and with the specific intention to further those purposes. See *Elfbrandt* v. *Russell*, [384 U. S., at] 11; *Aptheker* v. *Secretary of State*, 378 U. S. 500." *Id.*, at 122.

The chancellor's findings are not adequate to support the judgment against the NAACP.

## IV

In litigation of this kind the stakes are high. Concerted action is a powerful weapon. History teaches that special dangers are associated with conspiratorial activity.[79] And

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[79] In discussing the doctrine of criminal conspiracy, Justice Jackson noted:

"The crime comes down to us wrapped in vague but unpleasant connotations. It sounds historical undertones of treachery, secret plotting and violence on a scale that menaces social stability and the security of the state

yet one of the foundations of our society is the right of individuals to combine with other persons in pursuit of a common goal by lawful means.[80]

At times the difference between lawful and unlawful collective action may be identified easily by reference to its purpose. In this case, however, petitioners' ultimate objectives were unquestionably legitimate. The charge of illegality—like the claim of constitutional protection—derives from the means employed by the participants to achieve those goals. The use of speeches, marches, and threats of social ostracism cannot provide the basis for a damages award. But violent conduct is beyond the pale of constitutional protection.

The taint of violence colored the conduct of some of the petitioners. They, of course, may be held liable for the consequences of their violent deeds. The burden of demonstrating that it colored the entire collective effort, however, is not satisfied by evidence that violence occurred or even that violence contributed to the success of the boycott. A massive and prolonged effort to change the social, political, and economic structure of a local environment cannot be characterized as a violent conspiracy simply by reference to the ephemeral consequences of relatively few violent acts. Such a characterization must be supported by findings that adequately disclose the evidentiary basis for concluding that specific parties agreed to use unlawful means, that carefully

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itself. 'Privy conspiracy' ranks with sedition and rebellion in the Litany's prayer for deliverance. Conspiratorial movements do indeed lie back of the political assassination, the *coup d'etat*, the *putsch*, the revolution, and seizures of power in modern times, as they have in all history." *Krulewitch* v. *United States*, 336 U. S., at 448 (concurring opinion).

[80] "The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of association therefore appears to me almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society." 1 A. de Tocqueville, Democracy in America 203 (P. Bradley ed. 1954).

identify the impact of such unlawful conduct, and that recognize the importance of avoiding the imposition of punishment for constitutionally protected activity. The burden of demonstrating that fear rather than protected conduct was the dominant force in the movement is heavy. A court must be wary of a claim that the true color of a forest is better revealed by reptiles hidden in the weeds than by the foliage of countless freestanding trees. The findings of the chancellor, framed largely in the light of two legal theories rejected by the Mississippi Supreme Court, are constitutionally insufficient to support the judgment that all petitioners are liable for all losses resulting from the boycott.

The judgment is reversed. The case is remanded for further proceedings not inconsistent with this opinion.

*It is so ordered.*

JUSTICE REHNQUIST concurs in the result.

JUSTICE MARSHALL took no part in the consideration or decision of this case.

## APPENDIX TO OPINION OF THE COURT

Portions of speech delivered by Charles Evers on April 19, 1969 (Record 1092–1108):

"Thank you very much. We want our white friends here to know what we tell them happens to be so. Thank you for having the courage to walk down those streets with us. We thank you for letting our white brethren know that guns and bullets ain't gonna stop us. (No) (No) We thank you for letting our white brothers know that Port Gibson ain't none of their town. (Amen) (Applause) That Port Gibson is all of our town. (Applause) That black folks, red folks, Chinese and Japanese alike (Yeah) (That's right.), that we are going to have our share. (Yeah, we are.)

. . . . . .

"We are going to beat you because we know you can't trick us no more. (yea) You are not going to be able to fool us by getting somebody to give us a drink of whiskey no more. (Applause) You ain't gonna be able to fool us by somebody giving us a few dollars no more. (Applause) We are gonna take your money and drink with you and then we're gonna (Applause) vote against you. Then we are going to elect a sheriff in this county and a sheriff that is responsible, that won't have to run and grab the telephone and call up the blood-thirsty highway patrol when he gets ready (Yeah) to come in and beat innocent folks down to the ground for no cause. (That's right) (Applause) (Boo) We are going to elect a sheriff that can call his deputies and represent black leaders in the community and stop whatever problem there is. (Yeah) (That's right.)

"Then we are going to do more than that. The white merchants of this town are so wrapped up in the power structure here, since you love your Police Department so well, since you support them so well (Yeah), we are going to let them buy your dirty clothes and your filthy, rotten groceries.

"Oh, no, white folks, we ain't going to shoot you with no bullet. (That's right.) We are going to shoot you with our ballots and with our bucks. (Yea) (That's right.) We are going to take away from you the thing that you have had over us all these years. (Yeah) Political power and economic power. While you kill our brothers and our sisters and rape our wives and our friends. (Yeah) You're guilty. You're guilty because you don't care a thing about anybody. (Yes.) And when you go and let a big, black burly nigger like you get on the police force (Yea) go down and grab another black brother's arm and hold it while a white racist stole him from us, and he's a liar if he says he didn't hold him.

. . . . .

"We mean what we are saying. We are not playing. (Right) We better not even think one of us is black. You better not even be caught near one of these stores. (Applause)

"We don't want you caught in Piggly-Wiggly. You remember how he grinned at us four years ago? (Yeah) You know how when he took office he grinned at us? (Yeah) He ain't hired nobody yet. (That's right) (No) And you know old Jitney Jungle down there with those funny letters down on the end? (That's right) (Applause) He haven't hired nobody in there yet. (No) Do you know poor ole M & M or whatever it stands for, mud and mush, I guess. (Applause) They're out here on the highway and they haven't hired none of us yet.

"Do you know Ellis who had a part-time boy all his life? He ain't hired nobody, is he, yet? (No) Then we got ole Stampley, and ninety-nine and three-fourths of his sales are black folks business. He got the nerve to tell me he ain't gonna put no nigger ringing his cash register. I got news for you, Brother Stampley. You can ring it your damn self. (Extra loud applause.) I want some of you fat cats after this meeting who wants three of our young boys who ain't a'scar'd of white folks (Applause) (Me) and we want you that's willing to follow the rules now to go down by Brother Stampley's and serve notice on him with our placards that we ain't coming no more.

"Then we are going to tell all the young men that drive Piggly-Wiggly trucks now (Yeah) (Be careful, Son.) because the soul brothers and the spirit is watching you. (Extra loud applause.)

"All right, Brother Wolf, you're next. (Applause) We got a couple of 'em to come down by Brother Wolf's. We mean business, white folks. We ain't gonna shoot you all, we are going to hit you where it hurts most. (In the pocketbook) (Applause) In the pocketbook and in the ballot box. (Applause) We may as well tell our friends at Alcorn to stay away from up here. (Yea) Now, you say, 'What's wrong with you niggers?' I'll tell you what is wrong with us niggers; We are tired of you white folks, you racists and you bigots mistreating us. (Yeah) We are tired of paying you to

deny us the right to even exist. (Tell 'em about it.) And we ain't coming back, white folks. (We ain't.)

"You all put a curfew on us at eight o'clock tonight. We are going to do you better than that. We are going to leave at one-thirty. (Loud applause) We are going to leave at one-thirty and we ain't coming back, white folks.

. . . . .

"We are going to have Brother McCay; we are going to have our newly elected mayor who we elected, we are going to have him around here, too. Come on back, my dear friend. He say, 'Naw, brother, we ain't coming.' 'Have you got rid of all those bigots you got on your police force?' 'No.' 'Have you hired Negroes in all them stores?' 'No.' 'Well, we ain't coming back.' (Right) That's all we gonna do. You know, what they don't realize is you put on this curfew, that is all we needed. Let me just give them some instructions. We are going to buy gas only from the Negro-owned service stations. We agreed on it, remember? Now, don't back upon your agreement. (Yea) I don't care how many Negroes working on it, that's too bad. We are going only to Negro-owned service stations. And we are going only—the only time you will see us around on this street, now listen good, you are going to Lee's Grocery and other stores on this end. Is that clear? (Yeah) (Applause)

"We don't want to go to none of them drugstores. They get us confused. Now, who am I going to get my medicine from? Let us know in time and we will be glad to furnish a car free to carry you anywhere you have to go to get a prescription filled. You can't beat this. (No) It won't cost you a dime. You go to any of the local black businessmen and tell them you have got to go to Vicksburg to get your stuff. And then if they don't carry you, let us know. We'll take care of them later. (Applause) Now, you know, we have got a little song that says, 'This is your thing, do what you want to do.' (Applause) This is our thing, let's do what we want to do with it. Let's make sure now—if you be dis-

obedient now you are going to be in trouble. Remember that, now, listen. Listen good. They are going to start saying, 'You know what, Evers is down there with his goon squad, . . .' Now, we know Claiborne County,—'with his goon squad harassing poor ole niggers.'

"Well, good white folks you have been harassing us all our lives. (Applause) And if we decided to harass you that's our business. (That's right) They are our children and we are going to discipline them the way we want to. Now, be sure you get all this right on all these tape recorders. Whatever I say on this trip I will say it in Jackson. (Amen) (Glory) And I will say it in Washington and New York. White folks ain't gonna never control us no more. (Applause)

. . . . .

"Now, my dear friends, the white folks have got the message. I hope you have got the message and tell every one of our black brothers until all these people are gone, you voted on this in the church, don't let me down, and don't let yourself down. We agreed in the church that we would vacate this town until they have met those requests, the white folks don't demand nothing out of us. All right, white folks, we are just saying until you decide when you want to do these little things we beg of you, we are not coming back. (No way)

"None of us better not be caught up here. (Yea) I don't care how old you are, I don't care how sick you are, I don't care how crazy you are, you better not be caught on these streets shopping in these stores until these demands are met. (Applause)

"Now, let's get together. Are you for this or against it? (Applause) (For it.) Remember you voted this. We intend to enforce it. You needn't go calling the chief of police, he can't help you none. You needn't go calling the sheriff, he can't help you none. (That's right.) He ain't going to offer

to sleep with none of us men, I can tell you that. (Applause) Let's don't break our little rules that you agreed upon here.

. . . . .

"Let's go to the funeral of our young son whenever the funeral is. I don't want you to come with hate because that is not going to solve our problems. (No hate.) We don't want you to hate the white folks here in Port Gibson. That is not going to solve it. If you hate what they have done, I hate to get personal, I hate what they did so much to Medgar, (I know.) I ain't going to ever stop hating them for that. But I am going to chase them in the way what I know is right and just. I am not going to lay out in the bushes and shoot no white folks. That's wrong. I am not gonna go out here and bomb none of them's home. (No) That's not right. But I am going to do everything in my power to take away all the power, political power, legal power that they possess anywhere I live. We are going to compete against them. When we blacks learn to support and respect each other, then and not until then, will white folks respect us. (Applause)

"Now, you know I trust white folks and I mean every word I say. But it comes a time when we got to make up in our mind individually, are we going to make those persons worthwhile. We done talked and raised all kind of sand all day here, now, what is really going to prove it, are we going to live up to what we have said? (Applause) Now if there is any one of us breaks what we agreed upon, you are just as guilty as that little trigger-happy, blood-thirsty rascal. (Tell 'em about it.)

. . . . .

"I go all over this country, and I ought not to tell you white folks this, and I tell other white folks that some day we are going to get together in Mississippi, black and white, and work out our problems. And we are ready to start whenever you are. If you are ready to start, we are. We ain't

going to let you push us, not one inch. (That's right.) If you come on beating us, we are going to fight back. (Right) We got our understanding. We are all God's children. The same man that brought you all here brought us. You could have been black just like we are. We could have been white and baldheaded just like you are. (Laughter) (Inaudible) We are going to work hard at this, Dan. We are going to be organized this time. We ain't going to be bought off and talked off. We are going to elect the county sheriff here this next time that don't need the highway patrol. Now, you see, Dan had a good chance to set himself up right, but he goofed it. He goofed. (Yeah) He blew it. (Laughter) Don't forget that, heah. (Right) It brings back memories like you know you remember things we do.

"Now, if you don't think it is necessary, we don't have to go back to the church. If you want to go back there, we can. I want you to make sure here that we are going to leave this town to our white brothers and we ain't coming back no more until all our requests have been met. Is that the common consent of all of you here? (Applause) (Let's go back to the church.) All right. Are we willing to make sure that everyone of us will be sure that none of the rest of our black brothers violate our . . . (Yea) We are all saying it now. Let's not say it now so much on my part. You know, I'm just sort of leading, you know, how these lawyers are, leading our folks on to say what has to be said. And that's the case. Let's make us a white town. We would like for you to start it. Be courteous now. Don't mistreat nobody. Tell them, in a nice forceful way, the curfew is going to be on until they do what we ask them."

Per Curiam

NOTICE: This opinion is subject to formal revision before publication in the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, pio@supremecourt.gov, of any typographical or other formal errors.

# SUPREME COURT OF THE UNITED STATES

No. 22–324

MICHELLE O'CONNOR-RATCLIFF, ET AL., PETITIONERS *v.* CHRISTOPHER GARNIER, ET UX.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[March 15, 2024]

PER CURIAM.

In 2014, Michelle O'Connor-Ratcliff and T. J. Zane created public Facebook pages to promote their campaigns for election to the Poway Unified School District (PUSD) Board of Trustees. While O'Connor-Ratcliff and Zane (whom we will call the Trustees) both had personal Facebook pages that they shared with friends and family, they used their public pages for campaigning and issues related to PUSD. After they won election, the Trustees continued to use their public pages to post PUSD-related content, including board-meeting recaps, application solicitations for board positions, local budget plans and surveys, and public safety updates. They also used their pages to solicit feedback and communicate with constituents. Their Facebook pages described them as "Government Official[s]" and noted their official positions. O'Connor-Ratcliff also created a public Twitter page, which she used in much the same way.

Christopher and Kimberly Garnier, who have children attending PUSD schools, often criticized the board of trustees. They began posting lengthy and repetitive comments on the Trustees' social-media posts—for instance, nearly identical

comments on 42 separate posts on O'Connor-Ratcliff's Facebook page and 226 identical replies within a 10-minute span to every tweet on her Twitter feed. The Trustees initially deleted the Garniers' comments before blocking them from commenting altogether.

The Garniers sued the Trustees under 42 U. S. C. §1983, seeking damages and declaratory and injunctive relief for the alleged violation of their First Amendment rights. At summary judgment, the District Court granted the Trustees qualified immunity as to the damages claims but allowed the case to proceed on the merits on the ground that the Trustees acted "under color of" state law when they blocked the Garniers. §1983.

The Ninth Circuit affirmed. It held that §1983's state-action requirement was satisfied because there was a "close nexus between the Trustees' use of their social media pages and their official positions." 41 F. 4th 1158, 1170 (2022). The court cited its own state-action precedent, which holds that an off-duty state employee acts under color of law if she (1) "purports to or pretends to act under color of law"; (2) her "pretense of acting in the performance of [her] duties had the purpose and effect of influencing the behavior of others"; and (3) the "harm inflicted on plaintiff related in some meaningful way either to the officer's governmental status or to the performance of [her] duties." *Ibid.* (citing *Naffe* v. *Frey*, 789 F. 3d 1030, 1037 (CA9 2015); internal quotation marks and alterations omitted). Applying that framework, the court found state action based largely on the official "appearance and content" of the Trustees' pages. 41 F. 4th, at 1171.

We granted certiorari in this case and in *Lindke* v. *Freed*, ___ U. S. ___ (2024), to resolve a Circuit split about how to identify state action in the context of public officials using social media. 598 U. S. ___ (2023). Because the approach that the Ninth Circuit applied is different from the one we have elaborated in *Lindke*, we vacate the judgment below

and remand the case to the Ninth Circuit for further proceedings consistent with our opinion in that case.

*It is so ordered.*

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

# SUPREME COURT OF THE UNITED STATES

Syllabus

## PACKINGHAM *v.* NORTH CAROLINA

CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

No. 15–1194. Argued February 27, 2017—Decided June 19, 2017

North Carolina law makes it a felony for a registered sex offender "to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages." N. C. Gen. Stat. Ann. §§14–202.5(a), (e). According to sources cited to the Court, the State has prosecuted over 1,000 people for violating this law, including petitioner, who was indicted after posting a statement on his personal Facebook profile about a positive experience in traffic court. The trial court denied petitioner's motion to dismiss the indictment on the ground that the law violated the First Amendment. He was convicted and given a suspended prison sentence. On appeal, the State Court of Appeals struck down §14–202.5 on First Amendment grounds, but the State Supreme Court reversed.

*Held*: The North Carolina statute impermissibly restricts lawful speech in violation of the First Amendment. Pp. 4–10.

(a) A fundamental First Amendment principle is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more. Today, one of the most important places to exchange views is cyberspace, particularly social media, which offers "relatively unlimited, low-cost capacity for communication of all kinds," *Reno* v. *American Civil Liberties Union*, 521 U. S. 844, 870, to users engaged in a wide array of protected First Amendment activity on any number of diverse topics. The Internet's forces and directions are so new, so protean, and so far reaching that courts must be conscious that what they say today may be obsolete tomorrow. Here, in one of the first cases the Court has taken to address the relationship between the First Amendment and the modern Internet, the Court must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast

networks in that medium. Pp. 4–6.

(b) This background informs the analysis of the statute at issue. Even assuming that the statute is content neutral and thus subject to intermediate scrutiny, the provision is not "'"narrowly tailored to serve a significant governmental interest."'" *McCullen* v. *Coakley*, 573 U. S. ___, ___. Like other inventions heralded as advances in human progress, the Internet and social media will be exploited by the criminal mind. It is also clear that "sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people," *Ashcroft* v. *Free Speech Coalition*, 535 U. S. 234, 244, and that a legislature "may pass valid laws to protect children" and other sexual assault victims, *id.,* at 245. However, the assertion of a valid governmental interest "cannot, in every context, be insulated from all constitutional protections." *Stanley* v. *Georgia*, 394 U. S. 557, 563.

Two assumptions are made in resolving this case. First, while the Court need not decide the statute's precise scope, it is enough to assume that the law applies to commonplace social networking sites like Facebook, LinkedIn, and Twitter. Second, the Court assumes that the First Amendment permits a State to enact specific, narrowly-tailored laws that prohibit a sex offender from engaging in conduct that often presages a sexual crime, like contacting a minor or using a website to gather information about a minor.

Even with these assumptions, the statute here enacts a prohibition unprecedented in the scope of First Amendment speech it burdens. Social media allows users to gain access to information and communicate with one another on any subject that might come to mind. With one broad stroke, North Carolina bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge. Foreclosing access to social media altogether thus prevents users from engaging in the legitimate exercise of First Amendment rights. Even convicted criminals—and in some instances especially convicted criminals—might receive legitimate benefits from these means for access to the world of ideas, particularly if they seek to reform and to pursue lawful and rewarding lives. Pp. 6–8.

(c) The State has not met its burden to show that this sweeping law is necessary or legitimate to serve its purpose of keeping convicted sex offenders away from vulnerable victims. No case or holding of this Court has approved of a statute as broad in its reach. The State relies on *Burson* v. *Freeman*, 504 U. S. 191, but that case considered a more limited restriction—prohibiting campaigning within 100 feet of a polling place—in order to protect the fundamental right to vote.

Syllabus

The Court noted, moreover, that a larger buffer zone could "become an impermissible burden" under the First Amendment. *Id.,* at 210. The better analogy is *Board of Airport Comm'rs of Los Angeles* v. *Jews for Jesus, Inc.*, 482 U. S. 569. If an ordinance prohibiting any "First Amendment activities" at a single Los Angeles airport could be struck down because it covered all manner of protected, nondisruptive behavior, including "talking and reading, or the wearing of campaign buttons or symbolic clothing," *id.,* at 571, 575, it follows with even greater force that the State may not enact this complete bar to the exercise of First Amendment rights on websites integral to the fabric of modern society and culture. Pp. 9–10.

368 N. C. 380, 777 S. E. 2d 738, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed an opinion concurring in the judgment, in which ROBERTS, C. J., and THOMAS, J., joined. GORSUCH, J., took no part in the consideration or decision of the case.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

# SUPREME COURT OF THE UNITED STATES

No. 15–1194

LESTER GERARD PACKINGHAM, PETITIONER *v.* NORTH CAROLINA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

[June 19, 2017]

JUSTICE KENNEDY delivered the opinion of the Court.

In 2008, North Carolina enacted a statute making it a felony for a registered sex offender to gain access to a number of websites, including commonplace social media websites like Facebook and Twitter. The question presented is whether that law is permissible under the First Amendment's Free Speech Clause, applicable to the States under the Due Process Clause of the Fourteenth Amendment.

## I

### A

North Carolina law makes it a felony for a registered sex offender "to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages." N. C. Gen. Stat. Ann. §§14–202.5(a), (e) (2015). A "commercial social networking Web site" is defined as a website that meets four criteria. First, it "[i]s operated by a person who derives revenue from membership fees, advertising, or other sources related to the operation of the Web site." §14–202.5(b).

Second, it "[f]acilitates the social introduction between two or more persons for the purposes of friendship, meeting other persons, or information exchanges." *Ibid.* Third, it "[a]llows users to create Web pages or personal profiles that contain information such as the name or nickname of the user, photographs placed on the personal Web page by the user, other personal information about the user, and links to other personal Web pages on the commercial social networking Web site of friends or associates of the user that may be accessed by other users or visitors to the Web site." *Ibid.* And fourth, it "[p]rovides users or visitors . . . mechanisms to communicate with other users, such as a message board, chat room, electronic mail, or instant messenger." *Ibid.*

The statute includes two express exemptions. The statutory bar does not extend to websites that "[p]rovid[e] only one of the following discrete services: photo-sharing, electronic mail, instant messenger, or chat room or message board platform." §14–202.5(c)(1). The law also does not encompass websites that have as their "primary purpose the facilitation of commercial transactions involving goods or services between [their] members or visitors." §14–202.5(c)(2).

According to sources cited to the Court, §14–202.5 applies to about 20,000 people in North Carolina and the State has prosecuted over 1,000 people for violating it. Brief for Petitioner 6–8.

B

In 2002, petitioner Lester Gerard Packingham—then a 21-year-old college student—had sex with a 13-year-old girl. He pleaded guilty to taking indecent liberties with a child. Because this crime qualifies as "an offense against a minor," petitioner was required to register as a sex offender—a status that can endure for 30 years or more. See §14–208.6A; see §14–208.7(a). As a registered sex

offender, petitioner was barred under §14–202.5 from gaining access to commercial social networking sites.

In 2010, a state court dismissed a traffic ticket against petitioner. In response, he logged on to Facebook.com and posted the following statement on his personal profile:

> "Man God is Good! How about I got so much favor they dismissed the ticket before court even started? No fine, no court cost, no nothing spent. . . . . .Praise be to GOD, WOW! Thanks JESUS!" App. 136.

At the time, a member of the Durham Police Department was investigating registered sex offenders who were thought to be violating §14–202.5. The officer noticed that a "'J. R. Gerrard'" had posted the statement quoted above. 368 N. C. 380, 381, 777 S. E. 2d 738, 742 (2015). By checking court records, the officer discovered that a traffic citation for petitioner had been dismissed around the time of the post. Evidence obtained by search warrant confirmed the officer's suspicions that petitioner was J. R. Gerrard.

Petitioner was indicted by a grand jury for violating §14–202.5. The trial court denied his motion to dismiss the indictment on the grounds that the charge against him violated the First Amendment. Petitioner was ultimately convicted and given a suspended prison sentence. At no point during trial or sentencing did the State allege that petitioner contacted a minor—or committed any other illicit act—on the Internet.

Petitioner appealed to the Court of Appeals of North Carolina. That court struck down §14–202.5 on First Amendment grounds, explaining that the law is not narrowly tailored to serve the State's legitimate interest in protecting minors from sexual abuse. 229 N. C. App. 293, 304, 748 S. E. 2d 146, 154 (2013). Rather, the law "arbitrarily burdens all registered sex offenders by preventing a wide range of communication and expressive activity

unrelated to achieving its purported goal." *Ibid.* The North Carolina Supreme Court reversed, concluding that the law is "constitutional in all respects." 368 N. C., at 381, 777 S. E. 2d, at 741. Among other things, the court explained that the law is "carefully tailored . . . to prohibit registered sex offenders from accessing only those Web sites that allow them the opportunity to gather information about minors." *Id.*, at 389, 777 S. E. 2d, at 747. The court also held that the law leaves open adequate alternative means of communication because it permits petitioner to gain access to websites that the court believed perform the "same or similar" functions as social media, such as the Paula Deen Network and the website for the local NBC affiliate. *Id.*, at 390, 777 S. E. 2d, at 747. Two justices dissented. They stated that the law impermissibly "creates a criminal prohibition of alarming breadth and extends well beyond the evils the State seeks to combat." *Id.*, at 401, 777 S. E. 2d, at 754 (opinion of Hudson, J.) (alteration, citation, and internal quotation marks omitted).

The Court granted certiorari, 580 U. S. ___ (2016), and now reverses.

## II

A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more. The Court has sought to protect the right to speak in this spatial context. A basic rule, for example, is that a street or a park is a quintessential forum for the exercise of First Amendment rights. See *Ward* v. *Rock Against Racism*, 491 U. S. 781, 796 (1989). Even in the modern era, these places are still essential venues for public gatherings to celebrate some views, to protest others, or simply to learn and inquire.

While in the past there may have been difficulty in

identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the "vast democratic forums of the Internet" in general, *Reno* v. *American Civil Liberties Union*, 521 U. S. 844, 868 (1997), and social media in particular. Seven in ten American adults use at least one Internet social networking service. Brief for Electronic Frontier Foundation et al. as *Amici Curiae* 5–6. One of the most popular of these sites is Facebook, the site used by petitioner leading to his conviction in this case. According to sources cited to the Court in this case, Facebook has 1.79 billion active users. *Id.,* at 6. This is about three times the population of North America.

Social media offers "relatively unlimited, low-cost capacity for communication of all kinds." *Reno*, *supra,* at 870. On Facebook, for example, users can debate religion and politics with their friends and neighbors or share vacation photos. On LinkedIn, users can look for work, advertise for employees, or review tips on entrepreneurship. And on Twitter, users can petition their elected representatives and otherwise engage with them in a direct manner. Indeed, Governors in all 50 States and almost every Member of Congress have set up accounts for this purpose. See Brief for Electronic Frontier Foundation 15–16. In short, social media users employ these websites to engage in a wide array of protected First Amendment activity on topics "as diverse as human thought." *Reno*, *supra*, at 870 (internal quotation marks omitted).

The nature of a revolution in thought can be that, in its early stages, even its participants may be unaware of it. And when awareness comes, they still may be unable to know or foresee where its changes lead. Cf. D. Hawke, Benjamin Rush: Revolutionary Gadfly 341 (1971) (quoting Rush as observing: "'The American war is over; but this is far from being the case with the American revolution. On the contrary, nothing but the first act of the great drama

is closed'"). So too here. While we now may be coming to the realization that the Cyber Age is a revolution of historic proportions, we cannot appreciate yet its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be. The forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow.

This case is one of the first this Court has taken to address the relationship between the First Amendment and the modern Internet. As a result, the Court must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium.

## III

This background informs the analysis of the North Carolina statute at issue. Even making the assumption that the statute is content neutral and thus subject to intermediate scrutiny, the provision cannot stand. In order to survive intermediate scrutiny, a law must be "narrowly tailored to serve a significant governmental interest." *McCullen* v. *Coakley*, 573 U. S. ___, ___ (2014) (slip op., at 18) (internal quotation marks omitted). In other words, the law must not "burden substantially more speech than is necessary to further the government's legitimate interests." *Id.,* at ___ (slip op., at 19) (internal quotation marks omitted).

For centuries now, inventions heralded as advances in human progress have been exploited by the criminal mind. New technologies, all too soon, can become instruments used to commit serious crimes. The railroad is one example, see M. Crichton, The Great Train Robbery, p. xv (1975), and the telephone another, see 18 U. S. C. §1343. So it will be with the Internet and social media.

There is also no doubt that, as this Court has recog-

nized, "[t]he sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people." *Ashcroft* v. *Free Speech Coalition*, 535 U. S. 234, 244 (2002). And it is clear that a legislature "may pass valid laws to protect children" and other victims of sexual assault "from abuse." See *id.,* at 245; accord, *New York* v. *Ferber*, 458 U. S. 747, 757 (1982). The government, of course, need not simply stand by and allow these evils to occur. But the assertion of a valid governmental interest "cannot, in every context, be insulated from all constitutional protections." *Stanley* v. *Georgia*, 394 U. S. 557, 563 (1969).

It is necessary to make two assumptions to resolve this case. First, given the broad wording of the North Carolina statute at issue, it might well bar access not only to commonplace social media websites but also to websites as varied as Amazon.com, Washingtonpost.com, and Webmd.com. See *post,* at 6–9; see also Brief for Electronic Frontier Foundation 24–27; Brief for Cato Institute et al. as *Amici Curiae* 10–12, and n. 6. The Court need not decide the precise scope of the statute. It is enough to assume that the law applies (as the State concedes it does) to social networking sites "as commonly understood"—that is, websites like Facebook, LinkedIn, and Twitter. See Brief for Respondent 54; Tr. of Oral Arg. 27.

Second, this opinion should not be interpreted as barring a State from enacting more specific laws than the one at issue. Specific criminal acts are not protected speech even if speech is the means for their commission. See *Brandenburg* v. *Ohio*, 395 U. S. 444, 447–449 (1969) (*per curiam*). Though the issue is not before the Court, it can be assumed that the First Amendment permits a State to enact specific, narrowly tailored laws that prohibit a sex offender from engaging in conduct that often presages a sexual crime, like contacting a minor or using a website to gather information about a minor. Cf. Brief for Respond-

ent 42–43. Specific laws of that type must be the State's first resort to ward off the serious harm that sexual crimes inflict. (Of importance, the troubling fact that the law imposes severe restrictions on persons who already have served their sentence and are no longer subject to the supervision of the criminal justice system is also not an issue before the Court.)

Even with these assumptions about the scope of the law and the State's interest, the statute here enacts a prohibition unprecedented in the scope of First Amendment speech it burdens. Social media allows users to gain access to information and communicate with one another about it on any subject that might come to mind. *Supra,* at 5. By prohibiting sex offenders from using those websites, North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge. These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. They allow a person with an Internet connection to "become a town crier with a voice that resonates farther than it could from any soapbox." *Reno*, 521 U. S., at 870.

In sum, to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights. It is unsettling to suggest that only a limited set of websites can be used even by persons who have completed their sentences. Even convicted criminals—and in some instances especially convicted criminals—might receive legitimate benefits from these means for access to the world of ideas, in particular if they seek to reform and to pursue lawful and rewarding lives.

IV

The primary response from the State is that the law must be this broad to serve its preventative purpose of keeping convicted sex offenders away from vulnerable victims. The State has not, however, met its burden to show that this sweeping law is necessary or legitimate to serve that purpose. See *McCullen*, 573 U. S., at ___ (slip op., at 28).

It is instructive that no case or holding of this Court has approved of a statute as broad in its reach. The closest analogy that the State has cited is *Burson* v. *Freeman*, 504 U. S. 191 (1992). There, the Court upheld a prohibition on campaigning within 100 feet of a polling place. That case gives little or no support to the State. The law in *Burson* was a limited restriction that, in a context consistent with constitutional tradition, was enacted to protect another fundamental right—the right to vote. The restrictions there were far less onerous than those the State seeks to impose here. The law in *Burson* meant only that the last few seconds before voters entered a polling place were "their own, as free from interference as possible." *Id.,* at 210. And the Court noted that, were the buffer zone larger than 100 feet, it "could effectively become an impermissible burden" under the First Amendment. *Ibid.*

The better analogy to this case is *Board of Airport Comm'rs of Los Angeles* v. *Jews for Jesus, Inc.*, 482 U. S. 569 (1987), where the Court struck down an ordinance prohibiting any "First Amendment activities" at Los Angeles International Airport because the ordinance covered all manner of protected, nondisruptive behavior including "talking and reading, or the wearing of campaign buttons or symbolic clothing," *id.,* at 571, 575. If a law prohibiting "all protected expression" at a single airport is not constitutional, *id.*, at 574 (emphasis deleted), it follows with even greater force that the State may not enact this complete bar to the exercise of First Amendment rights on

websites integral to the fabric of our modern society and culture.

* * *

It is well established that, as a general rule, the Government "may not suppress lawful speech as the means to suppress unlawful speech." *Ashcroft* v. *Free Speech Coalition*, 535 U. S., at 255. That is what North Carolina has done here. Its law must be held invalid.

The judgment of the North Carolina Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

*It is so ordered.*

JUSTICE GORSUCH took no part in the consideration or decision of this case.

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# SUPREME COURT OF THE UNITED STATES

No. 15–1194

LESTER GERARD PACKINGHAM, PETITIONER *v.* NORTH CAROLINA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

[June 19, 2017]

JUSTICE ALITO, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, concurring in the judgment.

The North Carolina statute at issue in this case was enacted to serve an interest of "surpassing importance." *New York* v. *Ferber*, 458 U. S. 747, 757 (1982)—but it has a staggering reach. It makes it a felony for a registered sex offender simply to visit a vast array of websites, including many that appear to provide no realistic opportunity for communications that could facilitate the abuse of children. Because of the law's extraordinary breadth, I agree with the Court that it violates the Free Speech Clause of the First Amendment.

I cannot join the opinion of the Court, however, because of its undisciplined dicta. The Court is unable to resist musings that seem to equate the entirety of the internet with public streets and parks. *Ante*, at 4–5. And this language is bound to be interpreted by some to mean that the States are largely powerless to restrict even the most dangerous sexual predators from visiting any internet sites, including, for example, teenage dating sites and sites designed to permit minors to discuss personal prob-

lems with their peers. I am troubled by the implications of the Court's unnecessary rhetoric.

## I

### A

The North Carolina law at issue makes it a felony for a registered sex offender "to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages." N. C. Gen. Stat. Ann. §§14–202.5(a), (e) (2015). And as I will explain, the statutory definition of a "commercial social networking Web site" is very broad.

Packingham and the State debate the analytical framework that governs this case. The State argues that the law in question is content neutral and merely regulates a "place" (*i.e.*, the internet) where convicted sex offenders may wish to engage in speech. See Brief for Respondent 20–25. Therefore, according to the State, the standard applicable to "time, place, or manner" restrictions should apply. See *Ward* v. *Rock Against Racism*, 491 U. S. 781, 791 (1989). Packingham responds that the challenged statute is "unlike any law this Court has considered as a time, place, or manner restriction," Brief for Petitioner 37, and he advocates a more demanding standard of review, *id.*, at 37–39.

Like the Court, I find it unnecessary to resolve this dispute because the law in question cannot satisfy the standard applicable to a content-neutral regulation of the place where speech may occur.

### B

A content-neutral "time, place, or manner" restriction must serve a "legitimate" government interest, *Ward*, *supra*, at 798, and the North Carolina law easily satisfies this requirement. As we have frequently noted, "[t]he

prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *Ferber*, *supra*, at 757. "Sex offenders are a serious threat," and "the victims of sexual assault are most often juveniles." *McKune* v. *Lile*, 536 U. S. 24, 32 (2002) (plurality opinion); see *Connecticut Dept. of Public Safety* v. *Doe*, 538 U. S. 1, 4 (2003). "[T]he . . . interest [of] safeguarding the physical and psychological well-being of a minor . . . is a compelling one," *Globe Newspaper Co.* v. *Superior Court, County of Norfolk*, 457 U. S. 596, 607 (1982), and "we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights," *Ferber*, *supra*, at 757.

Repeat sex offenders pose an especially grave risk to children. "When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." *McKune*, *supra*, at 33 (plurality opinion); see *United States* v. *Kebodeaux*, 570 U. S. ___, ___–___ (2013) (slip op., at 8–9).

The State's interest in protecting children from recidivist sex offenders plainly applies to internet use. Several factors make the internet a powerful tool for the would-be child abuser. First, children often use the internet in a way that gives offenders easy access to their personal information—by, for example, communicating with strangers and allowing sites to disclose their location.[1] Second, the internet provides previously unavailable ways

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[1] See Pew Research Center, Teens, Social Media, and Privacy 5 (May 21, 2013), http://www.pewinternet.org/files/2013/05/PIP_TeensSocialMediaandPrivacy_PDF.pdf (all internet materials as last visited June 16, 2017); J. Wolak, K. Mitchell, & D. Finkelhor, National Center for Missing & Exploited Children, Online Victimization of Youth: Five Years Later 7 (2006) (prepared by Univ. of N. H., Crimes Against Children Research Center), http://www.unh.edu/ccrc/pdf/CV138.pdf.

of communicating with, stalking, and ultimately abusing children. An abuser can create a false profile that misrepresents the abuser's age and gender. The abuser can lure the minor into engaging in sexual conversations, sending explicit photos, or even meeting in person. And an abuser can use a child's location posts on the internet to determine the pattern of the child's day-to-day activities—and even the child's location at a given moment. Such uses of the internet are already well documented, both in research[2] and in reported decisions.[3]

Because protecting children from abuse is a compelling state interest and sex offenders can (and do) use the internet to engage in such abuse, it is legitimate and entirely

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[2] See *id.*, at 2–3; Wolak, Finkhor, Mitchell, & Ybarra, Online "Predators" and Their Victims, 63 Am. Psychologist 111, 112 (Feb.–Mar. 2008).

[3] For example, in *State* v. *Gallo*, 275 Ore. App. 868, 869, 365 P. 3d 1154, 1154–1155 (2015), a 32-year-old defendant posing as a 15-year-old boy used a social networking site to contact and befriend a 16-year-old autistic girl. "He then arranged to meet the victim, took her to a park, and sexually abused her." *Ibid.*, 365 P. 3d, at 1155. In *United States* v. Steele, 664 Fed. Appx. 260, 261 (CA3 2016), the defendant "began interacting with a minor [victim] on the gay social networking cell phone application 'Jack'd.'" He eventually met the 14-year-old victim and sexually abused him. *Ibid.* Sadly, these cases are not unique. See, *e.g.*, *Himko* v. *English*, 2016 WL 7645584, *1 (ND Fla., Dec. 5, 2016) (a convicted rapist and registered sex offender "contacted a sixteen-year-old girl using . . . Facebook" and then exchanged explicit text messages and photographs with her), report and recommendation adopted, 2017 WL 54246 (Jan. 4, 2017); *Roberts* v. *United States*, 2015 WL 7424858, *2–*3 (SD Ohio, Nov. 23, 2015) (the defendant "met a then 14-year-old child online via a social networking website called vampirefreaks.com" and then enticed the child to his home and "coerced the child to perform oral sex on him"), report and recommendation adopted, 2016 WL 112647 (Jan. 8, 2016), certificate of appealability denied, No. 16–3050 (CA6 June 15, 2016); *State* v. *Murphy*, 2016–0901, p. 3 (La. App. 1 Cir. 10/28/16), 206 So. 3d 219, 224 (a defendant "initiated conversations" with his 12-year-old victim "on a social network chat site called 'Kik'" and later sent sexually graphic photographs of himself to the victim and received sexually graphic photos from her).

reasonable for States to try to stop abuse from occurring before it happens.

C

1

It is not enough, however, that the law before us is designed to serve a compelling state interest; it also must not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward*, 491 U. S., at 798–799; see also *McCullen* v. *Coakley*, 573 U. S. ___, ___–___ (2014) (slip op., at 18–19). The North Carolina law fails this requirement.

A straightforward reading of the text of N. C. Gen. Stat. Ann. §14–202.5 compels the conclusion that it prohibits sex offenders from accessing an enormous number of websites. The law defines a "commercial social networking Web site" as one with four characteristics. First, the website must be "operated by a person who derives revenue from membership fees, advertising, or other sources related to the operation of the Web site." §14–202.5(b)(1). Due to the prevalence of advertising on websites of all types, this requirement does little to limit the statute's reach.

Second, the website must "[f]acilitat[e] the social introduction between two or more persons for the purposes of friendship, meeting other persons, or information exchanges." §14–202.5(b)(2). The term "social introduction" easily encompasses any casual exchange, and the term "information exchanges" seems to apply to any site that provides an opportunity for a visitor to post a statement or comment that may be read by other visitors. Today, a great many websites include this feature.

Third, a website must "[a]llo[w] users to create Web pages or personal profiles that contain information *such as* the name or nickname of the user, photographs placed on the personal Web page by the user, other personal infor-

mation about the user, and links to other personal Web pages on the commercial social networking Web site of friends or associates of the user that may be accessed by other users or visitors to the Web site." §14–202.5(b)(3) (emphasis added). This definition covers websites that allow users to create anything that can be called a "personal profile," *i.e.*, a short description of the user.[4] Contrary to the argument of the State, Brief for Respondent 26–27, everything that follows the phrase "such as" is an illustration of features that a covered website or personal profile may (but need not) include.

Fourth, in order to fit within the statute, a website must "[p]rovid[e] users or visitors . . . mechanisms to communicate with other users, *such as* a message board, chat room, electronic mail, or instant messenger." §14–202.5(b)(4) (emphasis added). This requirement seems to demand no more than that a website allow back-and-forth comments between users. And since a comment function is undoubtedly a "mechanis[m] to communicate with other users," *ibid.*, it appears to follow that any website with such a function satisfies this requirement.

2

The fatal problem for §14–202.5 is that its wide sweep precludes access to a large number of websites that are most unlikely to facilitate the commission of a sex crime against a child. A handful of examples illustrates this point.

Take, for example, the popular retail website Amazon.com, which allows minors to use its services[5] and

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[4] See New Oxford American Dictionary 1394 (3d ed. 2010); Webster's Third New International Dictionary 1811 (2002); 12 Oxford English Dictionary 576 (2d ed. 1989).

[5] See Amazon, Conditions of Use (June 21, 2016), https://www.amazon.com/gp/help/customer/display.html/ref=help_search_1-2?ie=UTF8&nodeId=201909000&qid=1490898710&sr=1-2.

meets all four requirements of §14–202.5's definition of a commercial social networking website. First, as a seller of products, Amazon unquestionably derives revenue from the operation of its website. Second, the Amazon site facilitates the social introduction of people for the purpose of information exchanges. When someone purchases a product on Amazon, the purchaser can review the product and upload photographs, and other buyers can then respond to the review.[6] This information exchange about products that Amazon sells undoubtedly fits within the definition in §14–202.5. It is the equivalent of passengers on a bus comparing notes about products they have purchased. Third, Amazon allows a user to create a personal profile, which is then associated with the product reviews that the user uploads. Such a profile can contain an assortment of information, including the user's name, e-mail address, and picture.[7] And fourth, given its back-and-forth comment function, Amazon satisfies the final statutory requirement.[8]

Many news websites are also covered by this definition. For example, the Washington Post's website gives minors access[9] and satisfies the four elements that define a com-

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[6] See Amazon, About Customer Reviews, https://www.amazon.com/gp/help/customer/display.html/ref=hp_left_v4_sib?ie=UTF8&nodeId=201967050; Amazon, About Public Activity, https://www.amazon.com/gp/help/customer/display.html/ref=hp_left_v4_sib?ie=UTF8&nodeId=202076150.

[7] See Amazon, About Your Profile, https://www.amazon.com/gp/help/customer/display.html/ref=hp_left_v4_sib?ie=UTF8&nodeId=202076210; Amazon, About Public Information, https://www.amazon.com/gp/help/customer/display.html/ref=help_search_1-2?ie=UTF8&nodeId=202076170&qid=1490835739&sr=1-2.

[8] Amazon does not appear to fall within the statute's exemption for websites that have as their "primary purpose the facilitation of commercial transactions involving goods or services between its members or visitors." §14–202.5(c)(2). Amazon's primary purpose seems to be the facilitation of commercial transactions between its users and *itself*.

[9] See Washington Post, Terms of Service (July 1, 2014), https://www.

mercial social networking website. The website (1) derives revenue from ads and (2) facilitates social introductions for the purpose of information exchanges. Users of the site can comment on articles, reply to other users' comments, and recommend another user's comment.[10] Users can also (3) create personal profiles that include a name or nickname and a photograph. The photograph and name will then appear next to every comment the user leaves on an article. Finally (4), the back-and-forth comment section is a mechanism for users to communicate among themselves. The site thus falls within §14–202.5 and is accordingly off limits for registered sex offenders in North Carolina.

Or consider WebMD—a website that contains health-related resources, from tools that help users find a doctor to information on preventative care and the symptoms associated with particular medical problems. WebMD, too, allows children on the site.[11] And it exhibits the four hallmarks of a "commercial social networking" website. It obtains revenue from advertisements.[12] It facilitates information exchanges—via message boards that allow users to engage in public discussion of an assortment of health issues.[13] It allows users to create basic profile

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washingtonpost.com/terms-of-service/2011/11/18/gIQAldiYiN_story.html?utm_term=.9be5851f95.

[10] See Washington Post, Ad choices (Nov. 21, 2011), https://www.washingtonpost.com/how-can-i-opt-out-of-online-advertising-cookies/2011/11/18/gIQABECbiN_story.html?utm_term=3da1f56d67e7; Washington Post, Privacy Policy (May 2, 2017), https://www.washingtonpost.com/privacy-policy/2011/11/18/gIQASIiaiN_story.html?utm_term=.8252a76f8df2.

[11] See WebMD, Terms and Conditions of Use (Nov. 2, 2016), https://www.webmd.com/about-webmd-policies/about-terms-and-conditions-of-use.

[12] WebMD, Advertising Policy (June 9, 2016), http://www.webmd.com/about-webmd-policies/about-advertising-policy.

[13] WebMD, Message Board Overview (Sept. 22, 2016), http://www.webmd.com/about-webmd-policies/about-community-overview.

pages: Users can upload a picture and some basic information about themselves, and other users can see their aggregated comments and "likes."[14] WebMD also provides message boards, which are specifically mentioned in the statute as a "mechanis[m] to communicate with other users." N. C. Gen. Stat. Ann. §14–202.5(b)(4).

As these examples illustrate, the North Carolina law has a very broad reach and covers websites that are ill suited for use in stalking or abusing children. The focus of the discussion on these sites—shopping, news, health—does not provide a convenient jumping off point for conversations that may lead to abuse. In addition, the social exchanges facilitated by these websites occur in the open, and this reduces the possibility of a child being secretly lured into an abusive situation. These websites also give sex offenders little opportunity to gather personal details about a child; the information that can be listed in a profile is limited, and the profiles are brief. What is more, none of these websites make it easy to determine a child's precise location at a given moment. For example, they do not permit photo streams (at most, a child could upload a single profile photograph), and they do not include up-to-the minute location services. Such websites would provide essentially no aid to a would-be child abuser.

Placing this set of websites categorically off limits from registered sex offenders prohibits them from receiving or engaging in speech that the First Amendment protects and does not appreciably advance the State's goal of protecting children from recidivist sex offenders. I am therefore compelled to conclude that, while the law before us addresses a critical problem, it sweeps far too broadly to satisfy the demands of the Free Speech Clause.[15]

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[14] See WebMD, Change Your Profile Settings (Feb. 19, 2014), http://www.webmd.com/about-webmd-policies/profile.

[15] I express no view on whether a law that does not reach the sort of

## II

While I thus agree with the Court that the particular law at issue in this case violates the First Amendment, I am troubled by the Court's loose rhetoric. After noting that "a street or a park is a quintessential forum for the exercise of First Amendment rights," the Court states that "cyberspace" and "social media in particular" are now "the most important places (in a spatial sense) for the exchange of views." *Ante*, at 4–5. The Court declines to explain what this means with respect to free speech law, and the Court holds no more than that the North Carolina law fails the test for content-neutral "time, place, and manner" restrictions. But if the entirety of the internet or even just "social media" sites[16] are the 21st century equivalent of public streets and parks, then States may have little ability to restrict the sites that may be visited by even the most dangerous sex offenders. May a State preclude an adult previously convicted of molesting children from visiting a dating site for teenagers? Or a site where minors communicate with each other about personal problems? The Court should be more attentive to the implications of its rhetoric for, contrary to the Court's suggestion, there are important differences between cyberspace and the physical world.

I will mention a few that are relevant to internet use by sex offenders. First, it is easier for parents to monitor the physical locations that their children visit and the individuals with whom they speak in person than it is to monitor their internet use. Second, if a sex offender is seen approaching children or loitering in a place fre-

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sites discussed above would satisfy the First Amendment. Until such a law is before us, it is premature to address that question.

[16]As the law at issue here shows, it is not easy to provide a precise definition of a "social media" site, and the Court makes no effort to do so. Thus, the scope of its dicta is obscure.

quented by children, this conduct may be observed by parents, teachers, or others. Third, the internet offers an unprecedented degree of anonymity and easily permits a would-be molester to assume a false identity.

The Court is correct that we should be cautious in applying our free speech precedents to the internet. *Ante*, at 6. Cyberspace is different from the physical world, and if it is true, as the Court believes, that "we cannot appreciate yet" the "full dimensions and vast potential" of "the Cyber Age," *ibid.*, we should proceed circumspectly, taking one step at a time. It is regrettable that the Court has not heeded its own admonition of caution.

Per Curiam

# PAPISH *v.* BOARD OF CURATORS OF THE UNIVERSITY OF MISSOURI ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 72–794. Decided March 19, 1973

Expulsion of student for distributing on campus a publication assertedly containing "indecent speech" proscribed by a bylaw of a state university's Board of Curators *held* an impermissible violation of her First Amendment free speech rights since the mere dissemination of ideas on a state university campus cannot be proscribed in the name of "conventions of decency."

Certiorari granted; 464 F. 2d 136, reversed.

PER CURIAM.

Petitioner, a graduate student in the University of Missouri School of Journalism, was expelled for distributing on campus a newspaper "containing forms of indecent speech" [1] in violation of a bylaw of the Board of Curators. The newspaper, the Free Press Underground, had been sold on this state university campus for more than four years pursuant to an authorization obtained from the University Business Office. The particular newspaper issue in question was found to be unacceptable for two reasons. First, on the front cover the publishers had reproduced a political cartoon previously printed in another newspaper depicting policemen raping the Statue of Liberty and the Goddess of Justice. The caption under the cartoon read: ". . . With Liberty and Justice for All." Secondly, the issue contained an article entitled "M-----f----- Acquitted," which discussed the trial and acquittal on an assault

[1] This charge was contained in a letter from the University's Dean of Students, which is reprinted in the Court of Appeals' opinion. 464 F. 2d 136, 139 (CA8 1972).

charge of a New York City youth who was a member of an organization known as "Up Against the Wall, M-----f-----."

Following a hearing, the Student Conduct Committee found that petitioner had violated Par. B of Art. V of the General Standards of Student Conduct which requires students "to observe generally accepted standards of conduct" and specifically prohibits "indecent conduct or speech."[2] Her expulsion, after affirmance first by the Chancellor of the University and then by its Board of Curators, was made effective in the middle of the spring semester. Although she was then permitted to remain on campus until the end of the semester, she was not given credit for the one course in which she made a passing grade.[3]

After exhausting her administrative review alternatives within the University, petitioner brought an action

[2] In pertinent part, the bylaw states:

"Students enrolling in the University assume an obligation and are expected by the University to conduct themselves in a manner compatible with the University's functions and missions as an educational institution. For that purpose students are required to observe generally accepted standards of conduct. . . . [I]ndecent conduct or speech . . . are examples of conduct which would contravene this standard. . . ." 464 F. 2d, at 138.

[3] Miss Papish, a 32-year-old graduate student, was admitted to the graduate school of the University in September 1963. Five and one-half years later, when the episode under consideration occurred, she was still pursuing her graduate degree. She was on "academic probation" because of "prolonged submarginal academic progress," and since November 1, 1967, she also had been on disciplinary probation for disseminating Students for a Democratic Society literature found at a university hearing to have contained "pornographic, indecent and obscene words." This dissemination had occurred at a time when the University was host to high school seniors and their parents. 464 F. 2d, at 139 nn. 3 and 4. But disenchantment with Miss Papish's performance, understandable as it may have been, is no justification for denial of constitutional rights.

for declaratory and injunctive relief pursuant to 42 U. S. C. § 1983 in the United States District Court for the Western District of Missouri. She claimed that her expulsion was improperly premised on activities protected by the First Amendment. The District Court denied relief, 331 F. Supp. 1321, and the Court of Appeals affirmed, one judge dissenting. 464 F. 2d 136. Rehearing *en banc* was denied by an equally divided vote of all the judges in the Eighth Circuit.

The District Court's opinion rests, in part,[4] on the conclusion that the banned issue of the newspaper was obscene. The Court of Appeals found it unnecessary to decide that question. Instead, assuming that the newspaper was not obscene and that its distribution in the community at large would be protected by the First Amendment, the court held that on a university campus "freedom of expression" could properly be "subordinated to other interests such as, for example, the conventions of decency in the use and display of language and pictures." *Id.*, at 145. The court concluded that "[t]he Constitution does not compel the University . . . [to allow] such publications as the one in litigation to be publicly sold or distributed on its open campus." *Ibid.*

This case was decided several days before we handed down *Healy* v. *James,* 408 U. S. 169 (1972), in which, while recognizing a state university's undoubted preroga-

[4] Prefatorily, the District Court held that petitioner, who was a nonresident of Missouri, was powerless to complain of her dismissal because she enjoyed no "federally protected or other right to attend a state university of a state of which she is not a domiciled resident." 331 F. Supp. 1321, 1326. The Court of Appeals, because it affirmed on a different ground, deemed it "unnecessary to comment" upon this rationale. 464 F. 2d, at 141 n. 9. The District Court's reasoning is directly inconsistent with a long line of controlling decisions of this Court. See *Perry* v. *Sindermann,* 408 U. S. 593, 596–598 (1972), and the cases cited therein.

tive to enforce reasonable rules governing student conduct, we reaffirmed that "state colleges and universities are not enclaves immune from the sweep of the First Amendment." *Id.*, at 180. See *Tinker* v. *Des Moines Independent School District*, 393 U. S. 503 (1969). We think *Healy* makes it clear that the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of "conventions of decency." Other recent precedents of this Court make it equally clear that neither the political cartoon nor the headline story involved in this case can be labeled as constitutionally obscene or otherwise unprotected. *E. g., Kois* v. *Wisconsin*, 408 U. S. 229 (1972); *Gooding* v. *Wilson*, 405 U. S. 518 (1972); *Cohen* v. *California*, 403 U. S. 15 (1971).[5] There is language in the opinions below which suggests that the University's action here could be viewed as an exercise of its legitimate authority to enforce reasonable regulations as to the time, place, and manner of speech and its dissemination. While we have repeatedly approved such regulatory authority, *e. g., Healy* v. *James*, 408 U. S., at 192–193, the facts set forth in the opinions below show clearly that petitioner was expelled because of the disapproved *content* of the newspaper rather than the time, place, or manner of its distribution.[6]

[5] Under the authority of *Gooding* and *Cohen*, we have reversed or vacated and remanded a number of cases involving the same expletive used in this newspaper headline. *Cason* v. *City of Columbus*, 409 U. S. 1053 (1972); *Rosenfeld* v. *New Jersey*, 408 U. S. 901 (1972); *Lewis* v. *City of New Orleans*, 408 U. S. 913 (1972); *Brown* v. *Oklahoma*, 408 U. S. 914 (1972). Cf. *Keefe* v. *Geanakos*, 418 F. 2d 359, 361 and n. 7 (CA1 1969).

[6] It is true, as MR. JUSTICE REHNQUIST's dissent indicates, that the District Court emphasized that the newspaper was distributed near the University's memorial tower and concluded that petitioner was engaged in "pandering." The opinion makes clear, however, that the reference to "pandering" was addressed to the content of the news-

Since the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech, and because the state University's action here cannot be justified as a nondiscriminatory application of reasonable rules governing conduct, the judgments of the courts below must be reversed. Accordingly the petition for a writ of certiorari is granted, the case is remanded to the District Court, and that court is instructed to order the University to restore to petitioner any course credits she earned for the semester in question and, unless she is barred from reinstatement for valid academic reasons, to reinstate her as a student in the graduate program.

*Reversed and remanded.*

MR. CHIEF JUSTICE BURGER, dissenting.

I join the dissent of JUSTICE REHNQUIST which follows and add a few observations.

The present case is clearly distinguishable from the Court's prior holdings in *Cohen, Gooding,* and *Rosenfeld,*

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paper and to the organization on the front page of the cartoon and the headline, rather than to the manner in which the newspaper was disseminated. 331 F. Supp., at 1325, 1328, 1329, 1330, 1332. As the Court of Appeals opinion states, "[t]he facts are not in dispute." 464 F. 2d, at 138. The charge against petitioner was quite unrelated to either the place or manner of distribution. The Dean's charge stated that the "forms of speech" contained in the newspaper were "improper on the University campus." *Id.,* at 139. Moreover, the majority below quoted without disapproval petitioner's verified affidavit stating that "no disruption of the University's functions occurred in connection with the distribution." *Id.,* at 139–140. Likewise, both the dissenting opinion in the Court of Appeals and the District Court opinion refer to this same uncontroverted fact. *Id.,* at 145; 331 F. Supp., at 1328. Thus, in the absence of any disruption of campus order or interference with the rights of others, the sole issue was whether a state university could proscribe this form of expression.

as erroneous as those holdings are.* *Cohen, Gooding,* and *Rosenfeld* dealt with prosecutions under criminal statutes which allowed the imposition of severe penalties. Unlike such traditional First Amendment cases, we deal here with rules which govern conduct on the campus of a state university.

In theory, at least, a university is not merely an arena for the discussion of ideas by students and faculty; it is also an institution where individuals learn to express themselves in acceptable, civil terms. We provide that environment to the end that students may learn the self-restraint necessary to the functioning of a civilized society and understand the need for those external restraints to which we must all submit if group existence is to be tolerable.

I find it a curious—even bizarre—extension of *Cohen, Gooding,* and *Rosenfeld* to say that a state university is impotent to deal with conduct such as that of the petitioner. Students are, of course, free to criticize the university, its faculty, or the Government in vigorous, or even harsh, terms. But it is not unreasonable or violative of the Constitution to subject to disciplinary action those individuals who distribute publications which are at the same time obscene and infantile. To preclude a state university or college from regulating the distribution of such obscene materials does not protect the values inherent in the First Amendment; rather, it demeans those values. The anomaly of the Court's holding today is

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**Cohen* v. *California,* 403 U. S. 15, 27 (1971) (BLACKMUN, J., with whom BURGER, C. J., and Black, J., joined, dissenting); *Gooding* v. *Wilson,* 405 U. S. 518, 528 (1972) (BURGER, C. J., dissenting), 534 (BLACKMUN, J., dissenting); *Rosenfeld* v. *New Jersey,* 408 U. S. 901, 902 (1972) (BURGER, C. J., dissenting), 903 (POWELL, J., dissenting), 909 (REHNQUIST, J., dissenting).

suggested by its use of the now familiar "code" abbreviation for the petitioner's foul language.

The judgment of the Court of Appeals was eminently correct. It should be affirmed.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, dissenting.

We held in *Healy* v. *James*, 408 U. S. 169, 180 (1972), that "state colleges and universities are not enclaves immune from the sweep of the First Amendment." But that general proposition does not decide the concrete case now before us. *Healy* held that the public university there involved had not afforded adequate notice and hearing of the action it proposed to take with respect to the students involved. Here the Court of Appeals found, and that finding is not questioned in this Court's opinion, that "the issue arises in the context of a student dismissal, after service of written charges and after a full and fair hearing, for violation of a University rule of conduct." 464 F. 2d 136, 138.

Both because I do not believe proper exercise of our jurisdiction warrants summary reversal in a case dependent in part on assessment of the record and not squarely governed by one of our decisions, and because I have serious reservations about the result reached by the Court, I dissent from the summary disposition of this case.

I

Petitioner Papish has for many years been a graduate student at the University of Missouri. Judge Stephenson, writing for the Court of Appeals in this case, summarized her record in these words:

> "Miss Papish's academic record reveals that she was in no rush to complete the requirements for her grad-

> uate degree in Journalism. She possesses a 1958 academic degree from the University of Connecticut; she was admitted to graduate school at the University of Missouri in September in 1963; and although she attended school through the fall, winter, and summer semesters, she was, after 6 years of work, making little, if any, significant progress toward the achievement of her stated academic objective. At the time of her dismissal, Miss Papish was enrolled in a one-hour course entitled 'Research Journalism' and in a three-hour course entitled 'Ceramics 4.' In the semester immediately preceding her dismissal, she was enrolled only in 'Ceramics 3.'" 464 F. 2d, at 138 n. 2.

Whatever may have been her lack of ability or motivation in the academic area, petitioner had been active on other fronts. In the words of the Court of Appeals:

> "3. On November 1, 1967, the Faculty Committee on Student Conduct, after notice of charges and a hearing, placed Miss Papish on disciplinary probation for the remainder of her student status at the University. The basis for her probation was her violation of the general standard of student conduct .... This action arose out of events which took place on October 14, 1967 at a time when the University was hosting high school seniors and their parents for the purpose of acquainting them with its educational programs and other aspects of campus life. She specifically was charged, *inter alia,* with openly distributing, on University grounds, without the permission of appropriate University personnel, two non-University publications of the Students for Democratic Society (SDS). It was alleged in the notice of charges, and apparently established at

> the ensuing hearing, that one of these publications, the *New Left Notes*, contained 'pornographic, indecent and obscene words, "f---," "bull s---," and "sh--s." ' The notice of charges also recites that the other publication, *The CIA at College: Into Twilight and Back*, contained 'a pornographic and indecent picture depicting two rats apparently fornicating on its cover . . . .'
>
> "4. Some two weeks prior to the incident causing her dismissal, Miss Papish was placed on academic probation because of prolonged submarginal academic progress. It was a condition of this probation that she pursue satisfactory work on her thesis, and that such work be evidenced by the completion and presentation of several completed chapters to her thesis advisor by the end of the semester. By letter dated January 31, 1969, Miss Papish was notified that her failure to comply with this special condition within the time specified would result in the termination of her candidacy for a graduate degree." *Id.*, at 138–139, nn. 3, 4.

It was in the light of this background that respondents finally expelled petitioner for the incident described in the Court's opinion. The Court fails to note, however, two findings made by the District Court with respect to the circumstances under which petitioner hawked her newspaper near the memorial tower of the University:

> "The Memorial Tower is the central unit of integrated structures dedicated to the memory of those students who died in the Armed Services in World Wars I and II. Other adjacent units include the Student Union and a Non-Sectarian chapel for prayer and meditation. Through the Memorial Arch pass parents of students, guests of the University, stu-

dents, including many persons under 18 years of age and high school students." 331 F. Supp. 1321, 1325 n. 4.

"The plaintiff knowingly and intentionally participated in distributing the publication to provoke a confrontation with the authorities by pandering the publication with crude, puerile, vulgar obscenities." *Id.*, at 1325.

II

I continue to adhere to the dissenting views expressed in *Rosenfeld* v. *New Jersey*, 408 U. S. 901 (1972), that the public use of the word "M-----f-----" is "lewd and obscene" as those terms were used by the Court in *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942). There the Court said:

> "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.*, at 571–572.

But even were I convinced of the correctness of the Court's disposition of *Rosenfeld*, I would not think it should control the outcome of this case. It simply does not follow under any of our decisions or from the language of the First Amendment itself that because peti-

tioner could not be criminally prosecuted by the Missouri state courts for the conduct in question, she may not therefore be expelled from the University of Missouri for the same conduct. A state university is an establishment for the purpose of educating the State's young people, supported by the tax revenues of the State's citizens. The notion that the officials lawfully charged with the governance of the university have so little control over the environment for which they are responsible that they may not prevent the public distribution of a newspaper on campus which contained the language described in the Court's opinion is quite unacceptable to me, and I would suspect would have been equally unacceptable to the Framers of the First Amendment. This is indeed a case where the observation of a unanimous Court in *Chaplinsky* that "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality" applies with compelling force.

III

The Court cautions that "disenchantment with Miss Papish's performance, understandable as it may have been, is no justification for denial of constitutional rights." Quite so. But a wooden insistence on equating, for constitutional purposes, the authority of the State to criminally punish with its authority to exercise even a modicum of control over the university which it operates, serves neither the Constitution nor public education well. There is reason to think that the "disenchantment" of which the Court speaks may, after this decision, become widespread among taxpayers and legislators. The system of tax-supported public universities which has grown up

in this country is one of its truly great accomplishments; if they are to continue to grow and thrive to serve an expanding population, they must have something more than the grudging support of taxpayers and legislators. But one can scarcely blame the latter if, told by the Court that their only function is to supply tax money for the operation of the university, the "disenchantment" may reach such a point that they doubt the game is worth the candle.

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# Rights Violations as Punishment

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# Rights Violations as Punishment

Kate Weisburd*

*Is punishment generally exempt from the Constitution? That is, can the deprivation of basic constitutional rights—such as the rights to marry, bear children, worship, consult a lawyer, and protest—be imposed as direct punishment for a crime and in lieu of prison, so long as such intrusions are not "cruel and unusual" under the Eighth Amendment? On one hand, such state intrusion on fundamental rights would seem unconstitutional. On the other hand, such intrusions are often less harsh than the restriction of rights inherent in prison. If a judge can sentence someone to life in prison, how can a judge not also have the power to strip someone of the right to marry, or speak, as direct punishment? Surprisingly, as this Article reveals, existing law offers no coherent explanation as to why rights-violating punishments somehow escape traditional constitutional scrutiny. Yet the question is critical as courts—often in the name of decarceration—increasingly impose non-carceral punishments that deprive people of constitutional rights.*

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*This Article argues that "punishment exemption"—the assumption that criminal punishment is exempt from traditional constitutional scrutiny—has no legal basis. Drawing on original empirical research, this Article first exposes a maze of modern non-carceral punishments that infringe on constitutional rights, justified by nothing more than the assertion that they are punishment and therefore permissible. If both legal and limitless, these rights-restricting punishments erase basic constitutional protections for people on court supervision and risk re-entrenching the very racial, gender, and economic inequities that decarceration efforts aim to address. This Article then explains, based on the Constitution's plain language and well-established constitutional principles, that punishment is not exempt from the Constitution. Rather, all punishment, including imprisonment, is state action subject to traditional constitutional scrutiny. Properly understood as such, many punishments—both carceral and non-carceral—may be unconstitutional.*

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## INTRODUCTION

To what extent can a judge deprive someone of fundamental constitutional rights as punishment for a crime and in lieu of prison? The question is not merely theoretical. For the 4.5 million people who are subject to criminal court control but not incarcerated, criminal punishments routinely restrict their rights to travel, marry, bear children, worship, socialize, and protest.[1] People under criminal court supervision are frequently required to provide DNA samples to law enforcement, use devices that measure drug and alcohol use, or wear GPS- and microphone-equipped ankle monitors that record and track their precise location 24/7, sometimes for months or years at a time.[2] And as part of non-carceral punishments, courts commonly order people to participate in religious drug treatment programs like Alcoholics Anonymous (AA) or others that may require individuals to sign self-incriminating acceptance of responsibility statements.[3]

These punishments, and others like them, highlight two interrelated and often conflicting phenomena in criminal law: increased reliance on "alternative" non-carceral punishments, and the increasing degree to which these punishments strip people of constitutional rights. Although the deprivation of rights has always featured prominently in all forms of punishment, advances in surveillance technology, along with the influence of private "community corrections"

1. *See infra* Part I.

2. *See infra* Part I; Kate Weisburd, *Punitive Surveillance*, 108 VA. L. REV. 147, 147–48 (2022) [hereinafter Weisburd, *Punitive Surveillance*].

3. *See infra* Part I; *see also* Laura I. Appleman, *The Treatment-Industrial Complex: Alternative Corrections, Private Prison Companies, and Criminal Justice Debt*, 55 HARV. C.R.-C.L. L. REV. 1, 18–23 (2020).

entrepreneurs, have created an even more invasive web of rights-restricting non-carceral punishments.[4] While these punishments are often imposed in the name of decarceration, they instead risk reinforcing what Professors Amanda Alexander and Reuben Jonathan Miller call "carceral citizenship,"[5] a status that legitimates the legal exclusion of historically subordinated groups and reinforces social-legal hierarchies based on race, class, disability, and gender.

This expanded landscape of non-carceral punishments surfaces a lurking but critical question: why do rights-violating punishments escape traditional constitutional review that applies outside of the punishment context?[6] On one hand, the "right to have rights" is "not a license that expires upon misbehavior,"[7] and non-carceral punishments that restrict rights seem like classic state actions that are unconstitutional "unless . . . narrowly tailored to [meet] a compelling state interest."[8] On the other hand, the rights deprivations inherent in non-carceral punishments are often less harsh than the deprivations inherent in prison. If a judge can sentence someone to life in prison, how can a judge not also have the power to strip someone of the right to marry, worship, or speak as direct punishment?

Punishment jurisprudence offers clues but no clear answer. A prison sentence, after all, involves the obvious deprivation of liberty, and people in prison generally lose rights that are "inconsistent with" incarceration.[9] Likewise, courts uphold exploitative prison labor and felony disenfranchisement as legal punishments explicitly permitted by the Thirteenth and Fourteenth Amendments.[10] And the deprivation of still other rights, such as the right to bear arms or serve on a jury, is justified as a collateral consequence of a criminal conviction.[11] But are non-carceral punishments that restrict religious practices or intimate relationships, for example, justified merely because they are punishment or rather because they pass First Amendment and substantive due process scrutiny? Likewise, is tracking a person's location 24/7 through a GPS ankle monitor permissible because it is punishment, or because it is considered a "reasonable" Fourth Amendment search?

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4. *See infra* Part I.

5. Reuben J. Miller & Amanda Alexander, *The Price of Carceral Citizenship: Punishment, Surveillance, and Social Welfare Policy in an Age of Carceral Expansion*, 21 MICH. J. RACE & L. 291, 294–97 (2016).

6. By "traditional," I mean the type of constitutional scrutiny or review that would apply but for the rights restriction being imposed as punishment.

7. Trop v. Dulles, 356 U.S. 86, 92, 102 (1958).

8. Reno v. Flores, 507 U.S. 292, 302 (1993).

9. Pell v. Procunier, 417 U.S. 817, 822 (1974).

10. Richardson v. Ramirez, 418 U.S. 24, 56 (1974) (upholding permanent disenfranchisement of people convicted of crimes); Draper v. Rhay, 315 F.2d 193, 197 (9th Cir. 1963) (holding that prison labor does not violate the Thirteenth Amendment).

11. *See* MARGARET COLGATE LOVE, JENNY ROBERTS & WAYNE A. LOGAN, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION: LAW, POLICY & PRACTICE § 2 (ed. 2021).

In short, is there something *special* about punishment that justifies what I refer to as "punishment exemption,"[12] the assumption that non-carceral punishment is exempt from traditional constitutional scrutiny? The question of punishment exemption is not limited to non-carceral punishments, though the problems are most stark in that context. People in prison—like people subject to non-carceral punishments—also lose rights, though there is a more robust, albeit often inadequate, legal regime to evaluate such deprivations.[13] No such legal framework exists with respect to non-carceral punishments. This Article engages these murky questions and offers a simple, if unexpected, answer: punishment is not exempt from the Constitution. All punishment, including imprisonment, is state action subject to traditional constitutional review.[14] Properly understood as such, many non-carceral punishments, along with some prison sentences, are unconstitutional, even if not cruel and unusual. How punishment exemption has nonetheless flourished, and its implications, is the focus of this Article.

Certainly, part of the puzzle is courts' failure to recognize, much less appreciate, the rights-stripping nature of non-carceral punishments. Because non-carceral punishments are generally viewed as "better" than prison—and they often are—the analysis of their impact on fundamental rights often stops there. But better-than-prison is a low threshold and fails to resolve the question of what constitutional scrutiny is due, much less whether these punishments are sound or humane policies.

Drawing on my ongoing and original empirical research on the operation of non-carceral punishments, this Article exposes the web of rights-violating

12. This Article's invocation of the term "punishment exemption" is inspired by, and part of, a burgeoning literature focused on exceptionalism in criminal law and procedure. While the thesis of this paper makes separate (but related) points, I view this wave of scholarship as a healthy sign of the decline of "siloing" criminal law and the rise of greater inquiries into what makes criminal law distinct. *See* Benjamin Levin, *Criminal Law Exceptionalism*, 108 VA. L. REV. 1381, 1434 (2022); Aaron Littman, *Jails, Sheriffs, and Carceral Policymaking*, 74 VAND. L. REV. 861, 930–32 (2021); Alice Ristroph, *The Wages of Criminal Law Exceptionalism,* 17 CRIM. L. & PHIL. 1, 5 (2021) [hereinafter Ristroph, *The Wages of Criminal Law Exceptionalism*]; Salil Dudani, Note, *Unconstitutional Incarceration: Applying Strict Scrutiny to Criminal Sentences*, 129 YALE L.J. 2112, 2132 (2020); Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 HARV. L. REV. 515, 570 (2021); Alice Ristroph, *An Intellectual History of Mass Incarceration*, 60 B.C. L. REV. 1949, 1953–54 (2019); Carol S. Steiker, *Capital Punishment and Contingency*, 125 HARV. L. REV. 760, 764 (2012) (reviewing DAVID GARLAND, PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION (2010)); Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1012 (2006).

13. *See infra* Part II.D.

14. A handful of scholars argue that prison sentences or probation detention should be subject to additional constitutional limits, including strict scrutiny, but none address the unique rights restrictions inherent in non-carceral punishments. *See* Driver & Kaufman, *supra* note 12, at 576; Jane Bambauer & Andrea Roth, *From Damage Caps to Decarceration: Extending Tort Law Safeguards to Criminal Sentencing*, 101 B.U. L. REV. 1667, 1676 (2021); Dudani, *supra* note 12, at 2132; Sherry F. Colb, *Freedom from Incarceration: Why Is This Right Different from All Other Rights?*, 69 N.Y.U. L. REV. 781, 783 (1994); Note, *The Right to Be Free from Arbitrary Probation Detention*, 135 HARV. L. REV. 1126, 1127 (2022); ALEC KARAKATSANIS, USUAL CRUELTY: THE COMPLICITY OF LAWYERS IN THE CRIMINAL INJUSTICE SYSTEM 78 (2019); Michael L. Zuckerman, *When a Prison Sentence Becomes Unconstitutional*, 111 GEO. L.J. 281, 338–39 (2022).

punishments that would typically be considered unconstitutional outside of the punishment context. To be sure, as alternatives to incarceration gain in popularity, scholars and activists have raised alarm about the restrictive and invasive nature of non-carceral punishments and how they reproduce the racialized carceral state, even if to a lesser degree than physical incarceration.[15]

My own prior experience defending young people in juvenile delinquency court reinforced these concerns. I saw firsthand how non-carceral punishments—such as house arrest, therapeutic courts, halfway houses, and GPS ankle monitoring—were not so much alternatives to incarceration but alternative *forms* of incarceration.[16] Even the label "non-carceral" is imperfect as it fails to capture the myriad ways that distinctly carceral logic defines purported alternatives to incarceration.[17]

Overlooked by scholars and courts alike, however, is the legal doctrine—and lack thereof—that has facilitated the proliferation of non-carceral punishments that restrict basic rights. Neither the text of the Constitution nor basic constitutional principles offer doctrinal support for exempting state action in the form of non-carceral punishment from traditional constitutional scrutiny.[18] Indeed, in his dissent in *Samson v. California,* in which the majority upheld suspicionless searches of people on parole, Justice Stevens cautioned that the Court has never "sanctioned the use of any search as a *punitive* measure."[19] Following this logic, a small handful of courts appear to reject punishment

15. *See, e.g.*, Michelle Alexander, Opinion, *The Newest Jim Crow*, N.Y. TIMES (Nov. 8, 2018), https://www.nytimes.com/2018/11/08/opinion/sunday/criminal-justice-reforms-race-technology.html [https://perma.cc/UV4E-B9JG]; Patricia J. Williams, *Why Everyone Should Care About Mass E-Carceration*, NATION (Apr. 29, 2019), https://www.thenation.com/article/archive/surveillance-prison-race-technology/ [https://perma.cc/U3SS-AKCD]; Miller & Alexander, *supra* note 5, at 294; Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1591 (2012); Chaz Arnett, *From Decarceration to E-Carceration*, 41 CARDOZO L. REV. 641, 663 (2019); MAYA SCHENWAR & VICTORIA LAW, PRISON BY ANY OTHER NAME: THE HARMFUL CONSEQUENCES OF POPULAR REFORMS 57 (2020); Aya Gruber, Amy J. Cohen & Kate Mogulescu, *Penal Welfare and the New Human Trafficking Intervention Courts*, 68 FLA. L. REV. 1333, 1401 (2016); Jessica M. Eaglin, *Against Neorehabilitation*, 66 SMU L. REV. 189, 222 (2013); JAMES KILGORE, UNDERSTANDING E-CARCERATION: ELECTRONIC MONITORING, THE SURVEILLANCE STATE, AND THE FUTURE OF MASS INCARCERATION 11–15 (2022); Derecka Purnell, *Reforms Are the Master's Tools*, MEDIUM: LEVEL (Oct. 19, 2020), https://level.medium.com/the-system-is-built-for-power-not-justice-c83e6dc4dd66 [https://perma.cc/HW54-9RQJ].

16. *See* James Kilgore, Emmett Sanders & Kate Weisburd, *The Case Against E-Carceration,* INQUEST (July 30, 2021), https://inquest.org/the-case-against-e-carceration/ [https://perma.cc/2F8T-M8H4].

17. *See, e.g.*, McLeod*, supra* note 15, at 1591 (observing that specialty courts, a type of non-carceral punishment, "threaten to produce a range of unintended and undesirable outcomes: unnecessarily expanding criminal surveillance, diminishing procedural protections, and potentially even increasing incarceration").

18. *See* Jones v. N.C. Prisoners' Lab. Union, Inc., 433 U.S. 119, 141 (1977) (Marshall, J., dissenting) (questioning the "wholesale abandonment of traditional principles of [constitutional] analysis" in the context of prison litigation).

19. 547 U.S. 843, 864 (2006) (Stevens, J., dissenting) (emphasis added).

exemption and subject at least some non-carceral punishments to traditional constitutional scrutiny, but they are the rare exception.[20]

More often, courts ignore the rights-stripping nature of non-carceral punishments, rely on the purported consent of the person subject to the punishment, assume the restrictions are merely "conditions" and not punishment, or uphold rights restrictions that "reasonably relate" to rehabilitation or public safety, a standard imported from the prison context.[21] These deferential approaches are consistent with Justices Scalia and Thomas's view that states should be afforded deference "to define and redefine all types of punishment, including imprisonment, to [include] various types of deprivations"[22] and that criminal conduct properly extinguishes the right against unwarranted confinement and liberty.[23] In a dissent penned by Justice Thomas and joined by Justice Scalia, the Justices explained that there is no general fundamental right to freedom from bodily restraint; if there were, "convicted prisoners could claim such a right," and "we would subject all prison sentences to strict scrutiny[, which] we have consistently refused to do."[24] Under this view, it is only the Eighth Amendment that limits punishment.[25]

The problem, however, is that there is no obvious legal basis to exempt punishment from traditional constitutional scrutiny that would otherwise apply.[26] Not only is consent a questionable legal basis,[27] but the "reasonably related" standard is often inapplicable to the non-carceral setting,[28] and classifying the deprivation of rights as a "condition" or "regulation" and not punishment is likewise legally, and factually, unsound.[29] Perhaps most significant, these deferential justifications do not resolve why rights-restricting punishments are exempt from the constitutional scrutiny that traditionally applies to state action.[30] Rather, as this Article argues, state action is state action regardless of the context. There is nothing exceptional about criminal punishment that makes it immune from standard constitutional scrutiny. Indeed, decades of prisoners' rights litigation have helped establish that incarceration does not escape constitutional scrutiny simply because it is imposed as punishment.[31] It may be that many long

20. *See infra* Part II.A.
21. *See infra* Parts II.B & III.C.
22. Overton v. Bazzetta, 539 U.S. 126, 139 (2003) (Thomas, J., concurring in the judgment).
23. *See* Foucha v. Louisiana, 504 U.S. 71, 121 (1992) (Thomas, J., dissenting).
24. *Id.* at 118.
25. *See* Overton, 539 U.S. at 139–40 (Thomas, J., concurring).
26. *Cf.* Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L. J. 490, 521 (2018) (considering whether constitutional doctrine "grants the state more expansive authority to preventively restrain defendants than members of the public at large").
27. *See infra* Part III.C.
28. *See infra* Part II.B.
29. *See infra* Part III.D; *see also* Weisburd, *Punitive Surveillance*, *supra* note 2, at 187.
30. *See infra* Part II.B.
31. *Id.*

prison sentences or certain types of non-carceral punishments are constitutional, but it is not because they are exempt from traditional constitutional review.

While some progressive legal scholarship understandably questions the efficacy of rights-based frameworks to disrupt the racial and economic inequities endemic to the carceral state,[32] this Article suggests that there is value added in challenging the legitimacy of punishment exemption and exposing its lack of jurisprudential support. On an immediate and pragmatic level, applying greater scrutiny to the deprivation of rights associated with punishment can shrink the carceral apparatus and rein in extreme rights infringements, as well as make visible rights deprivations that currently fly below the radar. A more radical reimagination of the carceral state—in all its permutations—is also in order,[33] and, at the same time, the need to reckon with the current state of punishment law remains.

On a broader jurisprudential level, exploring how rights-restricting punishments escape traditional constitutional scrutiny reveals a categorical chasm—and mismatch—between the fields of criminal procedure and constitutional law.[34] The surveillance inherent in electronic monitoring and community supervision, for example, raises not just Fourth Amendment concerns but also implicates First Amendment and substantive due process rights. Likewise, requiring someone to write an apology letter raises First Amendment concerns, but such a requirement could also be viewed as raising Fifth Amendment concerns since an inculpatory statement could be used against them in a later proceeding. Yet, the legal analysis of these practices is routinely siloed, with courts opting to not analyze Fourth Amendment problems as First Amendment or substantive due process problems and vice versa.[35] The disconnect between criminal procedure and constitutional law is neither preordained nor inevitable. In fact, by having law students take separate classes in criminal procedure and constitutional law, the legal academy sends a clear message that criminal procedure is *not* constitutional law, even though the two

32. *See* Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1467 (2016); Justin Driver, *Reactionary Rhetoric and Liberal Legal Academia*, 123 YALE L.J. 2616, 2621 (2014); Matthew Clair & Amanda Woog, *Courts and the Abolition Movement*, 110 CALIF. L. REV. 1, 6 (2022); Kathryn E. Miller, *The Myth of Autonomy Rights,* 43 CARDOZO L. REV. 375, 440 (2021).

33. *See, e.g.*, Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 479 (2018) (arguing for a "radical reimagination of the state and of law" in alignment with "social movements"); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1171 (2015) ("motivat[ing] the case for a prison abolitionist ethic"); MARIAME KABA, WE DO THIS 'TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE 14–18 (2021) (advocating for a new abolitionist perspective in law and society).

34. *See* SHARON DOLOVICH & ALEXANDRA NATAPOFF, THE NEW CRIMINAL JUSTICE THINKING 10–12 (2017) (making the case for a broad understanding of criminal law that accounts for both civil and criminal laws).

35. *See* Alex Abdo, *Why Rely on the Fourth Amendment to Do the Work of the First?*, 127 YALE L.J.F. 444, 451 (2017).

fields both focus on constitutional text and amendments.[36] This divide reflects—and may help explain—why criminal punishments are generally not viewed as raising constitutional concerns beyond the Eighth Amendment.

This Article proceeds in four Parts. Drawing on a large and ongoing empirical research project, Part I offers a portrait of rights-restricting non-carceral punishments to bring into focus the scope and impact of punishment exemption. Part II draws on the text of the Constitution as well as foundational constitutional principles to demonstrate the lack of jurisprudential support for punishment exemption. Part III addresses five anticipated objections: first, that prison is more restrictive than most non-carceral punishments yet still perfectly legal; second, that but for non-carceral punishments people would otherwise be imprisoned; third, that consent nullifies the need to address constitutional questions; fourth, that the deprivation of rights is not punishment, but rather a condition or rule; and fifth, that the Eighth Amendment is the only constitutional provision that limits punishment. Part IV explores the implications of applying traditional constitutional scrutiny to not just non-carceral punishment, but all punishment. It explains how restrictions on religion or speech, for example, are unconstitutional punishments unless they pass the applicable First Amendment scrutiny. The Article concludes with lessons for the future of decarceration.

## I.
## A PORTRAIT OF RIGHTS VIOLATIONS AS PUNISHMENT

As courts and legislators increasingly look to non-carceral punishments—often in the name of decarceration—the lack of jurisprudential support for these rights-restricting punishments comes into sharp focus. Drawing on my original empirical research, this Section shines a light on a few examples of rights-restricting non-carceral punishments, the impact of the restrictions, and how they exemplify the problem of exempting punishment from traditional constitutional review.

### *A. The Rise of Non-Carceral Punishment*

Several forces have contributed to the increased use of non-carceral punishments: bipartisan interest in curbing mass incarceration, advances in surveillance technology, and the influence of the "technocorrections"[37] industry

36. For a detailed analysis of the law school curriculum as "pro-carceral" and underinclusive, see Shaun Ossei-Owusu, *Making Penal Bureaucrats*, INQUEST (Aug. 23, 2021), https://inquest.org/making-penal-bureaucrats/ [https://perma.cc/MAY3-345B]; Alice Ristroph, *The Curriculum of the Carceral State*, 120 COLUM. L. REV. 1631, 1635–39 (2020); Sharon Dolovich, *Teaching Prison Law*, 62 J. LEGAL EDUC. 218, 222 (2012).

37. Ruha Benjamin, *The Shiny, High-Tech Wolf in Sheep's Clothing*, MEDIUM: LEVEL (Oct. 22, 2020), https://level.medium.com/the-shiny-high-tech-wolf-in-sheeps-clothing-17d8db219b6d [https://perma.cc/JCC9-FZ8E].

and other private vendors that market "alternatives" to incarceration.[38] Together, these forces, further accelerated by the COVID-19 crisis in prisons and jails, produced an expanded landscape of incarceration alternatives, including therapeutic and (or) mental health courts,[39] electronic monitoring,[40] community service programs,[41] drug courts,[42] restitution centers,[43] residential religious treatment programs,[44] domestic violence and sex offense courts,[45] shoplifting diversion,[46] special court programs for people convicted of prostitution,[47] community courts,[48] treatment centers,[49] and police- or prosecutor-led restorative justice circles,[50] to name just a few.

In general, non-carceral punishments are imposed for low-level felonies, misdemeanors, and non-violent crimes, or for people accused of crimes for the

38. Appleman, *supra* note 3, at 2; *see* Malcolm M. Feeley, *Entrepreneurs of Punishment: How Private Contractors Made and Are Remaking the Modern Criminal Justice System—An Account of Convict Transportation and Electronic Monitoring*, 17 CRIMINOLOGY, CRIM. JUST., L. & SOC'Y 1, 24 (2016).

39. *See* McLeod, *supra* note 15, at 1613.

40. *See* Eli Hager, *Where Coronavirus Is Surging—and Electronic Surveillance, Too*, MARSHALL PROJECT (Nov. 22, 2020), https://www.themarshallproject.org/2020/11/22/where-coronavirus-is-surging-and-electronic-surveillance-too [https://perma.cc/GR5N-YV5Q]; April Glaser, *Incarcerated at Home: The Rise of Ankle Monitors and House Arrest During the Pandemic*, NBC NEWS (July 5, 2021), https://www.nbcnews.com/tech/tech-news/incarcerated-home-rise-ankle-monitors-house-arrest-during-pandemic-n1273008 [https://perma.cc/UR8D-WTNB].

41. *See* LUCERO HERRERA, TIA KOONSE, MELANIE SONSTENG-PERSON & NOAH ZATZ, UCLA LAB. CTR. & UCLA SCH. OF L., WORK, PAY, OR GO TO JAIL: COURT-ORDERED COMMUNITY SERVICE IN LOS ANGELES 2–3 (2019), https://www.labor.ucla.edu/wp-content/uploads/2019/10/UCLA_CommunityServiceReport_Final_1016.pdf [https://perma.cc/YQ8G-46VV].

42. *See* SCHENWAR & LAW, *supra* note 15, at 5; Erin R. Collins, *The Problem of Problem-Solving Courts*, 54 U.C. DAVIS L. REV. 1573, 1576–78 (2021); Jessica M. Eaglin, *The Drug Court Paradigm*, 53 AM. CRIM. L. REV. 595, 596–97 (2016); Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. REV. 783, 834–35 (2008); Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479, 1481–82 (2004).

43. *See* Anna Wolfe & Michelle Liu, *Think Debtors Prisons Are a Thing of the Past? Not in Mississippi.*, MARSHALL PROJECT (Jan. 9, 2020), https://www.themarshallproject.org/2020/01/09/think-debtors-prisons-are-a-thing-of-the-past-not-in-mississippi [https://perma.cc/8JDV-GKDU].

44. *See* Shoshana Walter, *At Hundreds of Rehabs, Recovery Means Work Without Pay*, REVEAL (July 7, 2020), https://revealnews.org/article/at-hundreds-of-rehabs-recovery-means-work-without-pay/ [https://perma.cc/G44H-QRSP].

45. *See* McLeod, *supra* note 15, at 1621; Erin R. Collins, *Status Courts*, 105 GEO. L.J. 1481, 1483 (2017).

46. *See* John Rappaport, *Criminal Justice, Inc.*, 118 COLUM. L. REV. 2251, 2272 (2018).

47. *See* Christina Goldbaum, *Charged with Prostitution, She Went to a Special Court. Did It Help?*, N.Y. TIMES (Jan. 6. 2020), https://www.nytimes.com/2020/01/06/nyregion/ny-prostitution-courts.html [https://perma.cc/AGA4-BM4G]; Gruber, Cohen & Mogulescu, *supra* note 15, at 1333.

48. Anthony C. Thompson, *Courting Disorder: Some Thoughts on Community Courts*, 10 WASH. U. J.L. & POL'Y 63, 65 (2002).

49. *See* Priscilla A. Ocen, *Awakening to a Mass Supervision Crisis*, ATL. (Dec. 26. 2019), https://www.theatlantic.com/politics/archive/2019/12/parole-mass-supervision-crisis/604108/ [https://perma.cc/GCS4-39FE].

50. *See* Bruce A. Green & Lara Bazelon, *Restorative Justice from Prosecutors' Perspective*, 88 FORDHAM L. REV. 2287, 2289–90 (2020).

first time.[51] As Professor Issa Kohler-Hausmann describes her experience observing criminal court in New York City, "[s]it in any misdemeanor arraignment or all-purpose part in the city, and you will hear a veritable alphabet soup of programs being offered and accepted as part of case dispositions."[52] Usually imposed at sentencing, these punishments are often standalone programs but other times take the form of additional conditions or restrictions added onto existing sanctions. People convicted of crimes are most frequently asked to consent to certain non-carceral punishments, even though the court has the authority to impose the punishment regardless of the individual's consent.[53] While these programs do not involve jail time, they represent what Professors Jonathan Simon and Malcolm Feeley term the "new penology," which relies on techniques to "identify, classify, and manage" people based on their alleged offenses.[54]

Although there are many examples of non-carceral punishment, this Section focuses on only a few, with the goal of highlighting the ways in which non-carceral punishment escapes traditional constitutional scrutiny. Many of these examples come from my large and ongoing empirical research project examining the operation of punishment outside of prisons.[55] This research involves collecting and analyzing hundreds of agency records (such as rules and internal policies) that govern non-carceral punishment. Taken together, these records paint a vivid picture of carceral practices operating outside of physical prisons. The categories below are approximate, as there is often overlap between programs or different names for the same program depending on the jurisdiction.

### *1. Probation, Parole, and Supervised Release*

Probation, parole, and other forms of court supervision have long been deployed as alternatives to incarceration while also being recognized as

51. *See* Jenny Roberts, *Informed Misdemeanor Sentencing*, 46 HOFSTRA L. REV. 171, 174 (2017); Fiona Doherty, *Testing Periods and Outcome Determination in Criminal Cases*, 103 MINN. L. REV. 1699, 1704 (2019) [hereinafter Doherty, *Testing*]; Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291, 294, 325–26 (2016) [hereinafter Doherty, *Obey All Laws*]; Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1086 (2015).

52. ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING 241 (2018).

53. *See infra* Part III.C; Kate Weisburd, *Carceral Control: A Nationwide Survey of Criminal Court Supervision Rules*, 58 HARV. C.R.-C.L. L. REV. 1, 9 (2023).

54. Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449, 452 (1992).

55. *See* KATE WEISBURD, VARUN BHADHA, MATTHEW CLAUSON, JEANMARIE ELICAN, FATIMA KHAN, KENDALL LAWRENZ, BROOKE PEMBERTON, REBECCA RINGLER, JORDAN SCHAER, MIKAYLA SHERMAN & SARAH WOHLSDORF, GEO. WASH. UNIV. L. SCH., ELECTRONIC PRISONS: THE OPERATION OF ANKLE MONITORING IN THE CRIMINAL LEGAL SYSTEM 2–3 (2021) [hereinafter ELECTRONIC PRISONS], https://ssrn.com/abstract=3930296 [https://perma.cc/JM49-TX2X]; Weisburd, *supra* note 53, at 7–23.

punishment.[56] There are currently nearly 4.5 million people on probation, parole, or supervised release.[57] Probation is generally imposed in cases where a defendant is not eligible for a prison sentence or might otherwise be incarcerated but is instead sentenced to probation. Parole, by contrast, is most often provided for by statute and exists as a way for people to complete their prison sentence outside of a prison. In the federal system, federal supervised release is added on at the end of a prison sentence.[58]

The deprivation of rights is a definitional part of court supervision. As other scholars have shown, people on probation, parole, and supervised release are subject to dozens of restrictive and invasive rules.[59] These rules govern all aspects of life: suspicionless searches, random drug testing, collection of DNA samples, court-mandated treatment programs, community service, restrictions on associating with certain people, curfews, and house arrest are all common features of court supervision.[60]

### *2. Halfway Houses and Work Centers*

Throughout the country, people are often sentenced to spend time after a prison sentence at halfway houses, residential drug treatment programs, or work centers. Because people sent to these residential programs are often already on probation, parole, or supervised release, they are subject to multiple sets of rules—the rules governing court supervision and the rules of the program or facility. In most places, the programs are residential, and participants must abide by curfew and are limited in when they can leave and where they can go.[61] In many work and restitution centers, residents are restricted in the use of their income. They are often prevented from having ATM cards and forced to save a certain percentage of their income.[62]

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56. *See* Griffin v. Wisconsin, 483 U.S. 868, 874 (1987); SANFORD H. KADISH, STEPHEN J. SCHULHOFER & RACHEL E. BARKOW, CRIMINAL LAW AND ITS PROCESSES 141 (10th ed. 2017); Michelle S. Phelps, *The Paradox of Probation: Community Supervision in the Age of Mass Incarceration*, 35 LAW & POL'Y 51, 52 (2013); Cecelia Klingele, *Rethinking the Use of Community Supervision*, 103 J. CRIM. L. & CRIMINOLOGY 1015, 1018 (2013).

57. BARBARA OUDEKERK & DANIELLE KAEBLE, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., PROBATION AND PAROLE IN THE UNITED STATES, 2019 2 tbl.1 (2021), https://bjs.ojp.gov/content/pub/pdf/ppus19.pdf [https://perma.cc/7AES-JYJ4].

58. *See* Jacob Schuman, *Supervised Release Is Not Parole*, 53 LOY. L.A. L. REV. 587, 603 (2020).

59. *See* Doherty, *Obey All Laws*, *supra* note 51, at 295–96; Phelps, *supra* note 56, at 73–74; Tonja Jacobi, L. Song Richardson & Gregory Barr, *The Attrition of Rights Under Parole*, 87 S. CAL. L. REV. 887, 897–98 (2014); Alexis Karteron, *Family Separation Conditions*, 122 COLUM. L. REV. 649, 652–53 (2022).

60. *See* Doherty, *Obey All Laws*, *supra* note 51, at 300–16.

61. *Id.*; Ocen, *supra* note 49; Eric Borsuk, *Inside the Absurd Limbo of a Post-Prison Halfway House*, VICE (Feb. 9, 2015), https://www.vice.com/en/article/vdpakb/halfway-to-nowhere-0000582-v22n2 [https://perma.cc/WG4U-6MYX].

62. Ocen, *supra* note 49.

Many of these programs also limit people's travel rights.[63] For example, a work release center in California forbids residents from leaving the center during the first few weeks of the program.[64] Even after the first few weeks, residents cannot drive a car or leave the center without an approved pass that includes a description of everyone and every place the resident will visit.[65]

Work and restitution centers take different forms. In Mississippi, people are sentenced to restitution centers where, for months (and sometimes years), they work for less than minimum wage and the state collects their pay, giving them only enough money to buy necessities.[66] Likewise, in Oklahoma, people are sentenced to rehabilitation camps where they are required to work for free and often in poor conditions, like in chicken processing plants.[67]

Non-government entities, both for-profit companies and non-profits, operate most halfway houses. The GEO Group, one of the largest contractors for private prisons and electronic monitoring in the country, runs Community Education Centers, which operate almost 30 percent of halfway houses nationwide.[68] The federal government also operates over 150 residential reentry centers with a total capacity of almost ten thousand residents.[69] Several work-release programs—both publicly and privately run—have been criticized for retaliation, arbitrary discipline by staff, rampant violence, inadequate staffing, and returning participants to prison for minor rule violations.[70]

### *3. Problem-Solving Courts and Treatment Programs*

There is a rich literature on the operation and efficacy of problem-solving courts and related specialized diversion programs.[71] These courts and treatment programs aim to address a wide range of issues (mental health, drug treatment, human trafficking, and prostitution, among others) and have different titles, such

63. *Id.*
64. *Id.*
65. *Id.*
66. *See* Wolfe & Liu, *supra* note 43.
67. *See* Walter, *supra* note 44; *Welcome to CAAIR*, CHRISTIAN ALCOHOLICS & ADDICTS IN RECOVERY (CAAIR), https://caair.org/ [https://perma.cc/FP6U-CVF8]; Appleman, *supra* note 3, at 1.
68. Roxanne Daniel & Wendy Sawyer, *What You Should Know About Halfway Houses*, PRISON POL'Y INITIATIVE (Sept. 3, 2020), https://www.prisonpolicy.org/blog/2020/09/03/halfway/ [https://perma.cc/ZRD4-G4G2].
69. *Id.*
70. Paul Kiefer, *Investigation of Work Release Centers Spurs Some Changes, but Advocates Proceed with Caution*, PUBLICOLA (July 7, 2021) https://publicola.com/2021/07/07/investigation-of-work-release-centers-spurs-some-changes-but-advocates-proceed-with-caution/ [https://perma.cc/X6PW-7LZV]; Sam Dolnick, *As Escapees Stream Out, a Penal Business Thrives*, N.Y. TIMES (June 16, 2012), https://www.nytimes.com/2012/06/17/nyregion/in-new-jersey-halfway-houses-escapees-stream-out-as-a-penal-business-thrives.html [https://perma.cc/4UMN-56WX].
71. *See, e.g.*, McLeod, *supra* note 15, at 1591–98; Christine S. Scott-Hayward, *Rethinking Federal Diversion: The Rise of Specialized Criminal Courts*, 22 BERKELEY J. CRIM. L. 47, 50–52 (2017); Michael D. Sousa, *Procedural Due Process, Drug Courts, and Loss of Liberty Sanctions*, 14 N.Y.U. J.L. & LIBERTY 733, 743–44 (2021); Gruber, Cohen & Mogulescu, *supra* note 15, at 1380; Collins, *supra* note 42, at 1601; Eaglin, *supra* note 15, at 222.

as community courts, drug courts, and specialty courts. Nonetheless, these programs share common characteristics. Most people are referred to problem-solving courts as part of the case disposition or are required to plead guilty as a prerequisite for entering the program. Treatment programs are likewise ordered as part of a case disposition, usually in addition to some form of court supervision. Problem-solving courts and treatment programs often involve a host of rights deprivations, from limited access to counsel to suspicionless searches and mandated treatment programs.[72] Participants who successfully complete the programs are sometimes eligible to have their case dismissed and (or) their record expunged.[73] The detailed, invasive, and onerous conditions of these programs make them easy to fail. People are often reincarcerated not for new offenses, but for violations of technical requirements.[74] As a result, these programs have been criticized as net-widening, pathologizing, and ineffective.[75]

*4. Electronic Monitoring and Other Forms of Technological Surveillance*

Every state uses some form of electronic ankle monitoring or surveillance, which is most often imposed in addition to probation, parole, or pretrial release.[76] The use of this technology is increasing exponentially, fueled in part by the COVID-19 pandemic.[77] Although electronic monitoring data is limited, numbers from a few jurisdictions reflect its increasing use. For example, in Harris County, Texas, electronic ankle monitoring skyrocketed from a daily average of twenty-seven people on monitors in 2019 to over four thousand people on monitors in 2021.[78] In Cook County, Illinois, there were over three thousand people on

72. *See* McLeod, *supra* note 15, at 1691; Collins, *supra* note 42, at 1491; Mae C. Quinn, *Whose Team Am I on Anyway? Musings of a Public Defender About Drug Treatment Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37, 50–52 (2000).

73. SCHENWAR & LAW, *supra* note 15, at 97.

74. *See* Phelps, *supra* note 56, at 53 (describing probation as a "net-widener" and an alternative to traditional incarceration); Doherty, *Obey All Laws*, *supra* at 51, at 345; Kate Weisburd, *Sentenced to Surveillance: Fourth Amendment Limits on Electronic Monitoring*, 98 N.C. L. REV. 717, 767–68 (2020) [hereinafter Weisburd, *Sentenced to Surveillance*].

75. Melissa Gira Grant, *Human Trafficking Courts Are Not a Criminal Justice "Innovation,"* NEW REPUBLIC (Jan. 7, 2020), https://newrepublic.com/article/156135/human-trafficking-courts-not-criminal-justice-innovation [https://perma.cc/KHG2-8TSR]; Gruber, Cohen & Mogulescu, *supra* note 15, at 1380; McLeod, *supra* note 15, at 1631; Collins, *supra* note 42, at 1601.

76. *See* Arnett, *supra* note 15, at 663; Avlana K. Eisenberg, *Mass Monitoring*, 90 S. CAL. L. REV. 123, 161 (2017); Weisburd, *Punitive Surveillance*, *supra* note 2, at 154; PATRICE JAMES, JAMES KILGORE, GABRIELA KIRK, GRACE MUELLER, EMMETT SANDERS, SARAH STAUDT & LATANYA JACKSON WILSON, SHRIVER CTR. ON POVERTY L., CAGES WITHOUT BARS: PRETRIAL ELECTRONIC MONITORING ACROSS THE UNITED STATES 11 (2022), https://www.povertylaw.org/wp-content/uploads/2022/09/cages-without-bars-final-rev1.pdf [https://perma.cc/LE4K-ELMW].

77. *See* Hager, *supra* note 40; Glaser, *supra* note 40.

78. Mario Díaz, *Harris County Electronic Monitor Population Skyrockets to Nearly 4,000*, HOUS. NBC (Oct. 15, 2021), https://www.click2houston.com/news/investigates/2021/10/15/harris-county-electronic-monitor-population-skyrockets-to-nearly-4000/ [https://perma.cc/FV75-8FC4].

monitors in 2021, which represented almost a 25 percent increase from the year before.[79] These numbers reflect national trends.[80]

Electronic surveillance includes tracking and analyzing people's location data, monitoring online activity, searching the contents of cell phones, and recording conversations between people.[81] In reviewing agency records governing the use of electronic ankle monitors, a few themes emerge. First, people on monitors are almost always required to remain in their homes unless they receive prior permission to leave from a supervising agent or agency, a rarely straightforward process.[82] For example, visiting the doctor, attending religious services, shopping, and taking children to school all require preapproval.[83] Second, people on monitors have their precise location data tracked, analyzed, and shared with law enforcement and courts. Most of the agency records in our research did not contain any privacy protection for the sensitive data collected through ankle monitors.[84] Third, people on ankle monitors are often subject to both the rules governing court supervision, as well as the additional (and often more restrictive and invasive) rules governing monitoring.[85]

Other forms of technological surveillance are also proliferating. For example, people are often tracked through cellphone applications[86] or are required to wear devices that detect drug or alcohol use.[87] These applications and devices allow for "perfect detection of inevitable imperfections"[88] with rules and requirements, thus raising concerns about hyper-compliance, overcriminalization, and the invasiveness of the surveillance.[89] Suspicionless

79. SARAH STAUDT, CHI. APPLESEED CTR. FOR FAIR CTS. & CHI. COUNCIL OF LAWS., 10 FACTS ABOUT PRETRIAL ELECTRONIC MONITORING IN COOK COUNTY 2 (2021), https://www.chicagoappleseed.org/wp-content/uploads/2021/11/202109_10-Facts-EM-Cook-County-EM-FINAL-updated.pdf [https://perma.cc/3HVB-HCSH].

80. WEISBURD ET AL., ELECTRONIC PRISONS, *supra* note 55, at 2.

81. *Id.* at 1.

82. *Id.* at 4.

83. *Id.* at 6.

84. *Id.* at 9.

85. Sandra Susan Smith & Cierra Robson*, Between a Rock and a Hard Place: The Social Costs of Pretrial Electronic Monitoring in San Francisco* 1, 10–11 (Harv. Kennedy Sch. Fac. Rsch. Working Paper No. RWP22-014, 2022).

86. Dhruv Mehrotra & Molly Osberg, *When Your Freedom Depends on an App*, GIZMODO (Apr. 27, 2020), https://gizmodo.com/when-your-freedom-depends-on-an-app-1843109198 [https://perma.cc/8DDC-5M92]; Kentrell Owens, Anita Alem, Franziska Roesner & Tadayoshi Kohno, *Electronic Monitoring Smartphone Apps: An Analysis of Risks from Technical, Human-Centered, and Legal Perspectives*, *in* PROCEEDINGS OF THE 31ST USENIX SECURITY SYMPOSIUM 4077, 4077 (2022).

87. Maya Dukmasova, *Cook County Judge Vazquez's Heavy Use of Sobriety Monitor Highlights Oversight Gaps*, INJUSTICE WATCH (Dec. 8, 2021), https://www.injusticewatch.org/news/judicial-conduct/2021/judge-vazquez-scram-monitor/ [https://perma.cc/BYZ7-NRHU].

88. Weisburd, *Sentenced to Surveillance*, *supra* note 74, at 764.

89. *Id.*; *see also* Mehrotra & Osberg, *supra* note 86; Dukmasova, *supra* note 87; *Jay-Z Invests in Company that Tracks Parolees with GPS Software*, BLACKBUSINESS (May 30, 2019),

searches of people's electronic devices is also common. In a fifty-state survey of rules governing court supervision, almost a quarter of the programs allow for warrantless searches of electronic devices.[90] Finally, in some places, people on court supervision must agree to have their social media accounts monitored. For example, the rules for probation in Pima County, Arizona, state: "I understand all social media accounts (e.g., Facebook, Snapchat, Twitter, etc.) are subject to search. I will provide all passcodes, usernames, and login information necessary as directed by the IPS team."[91] Likewise, people on parole in Vermont must "provide access to any social networking sites [they] participate in to [their] Parole Officer."[92]

### *B. The Scope of Rights Violations as Punishment*

The rights-stripping nature of these punishments exemplifies how punishment exemption operates: these rights deprivations would likely be unconstitutional if applied outside the context of punishment. Yet, because these rights violations are part of punishment, they escape traditional constitutional scrutiny. To be sure, some extreme features of probation and parole, such as pornography bans,[93] church attendance requirements,[94] penile plethysmography testing,[95] anti-procreation requirements,[96] and full internet bans[97] have been struck down as unreasonable or not sufficiently related to rehabilitation.[98] But these cases are the exception and not the norm. Constraints as extreme as these, as well as more "garden variety" forms of non-carceral punishments, are most often upheld. These restrictions are generally either upheld with little or no explanation or, as detailed below, upheld because the restriction "reasonably relates" to a purpose of punishment or because they are incorrectly categorized as "conditions" or collateral and, therefore, are not punishment.[99]

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https://www.blackbusiness.com/2019/05/jayz-invests-promise-company-tracks-parolees-gps-software.html [https://perma.cc/9CY2-QP4U]; Glaser, *supra* note 40.

90. Weisburd, *supra* note 53, at 13.

91. *Id.*

92. *Id.*

93. Laura A. Napoli, *Demystifying "Pornography": Tailoring Special Release Conditions Concerning Pornography and Sexually Oriented Expression*, 11 U. N.H. L. REV. 69, 83 (2013).

94. State v. Evans, 796 P.2d 178, 179–80 (Kan. Ct. App. 1990).

95. United States v. McLaurin, 731 F.3d 258, 264 (2d Cir. 2013). For a more detailed description of this tool, as well as how it is used in criminal cases, see generally Lisa Murphy, Emily Gottfried, Keana DiMario, Derek Perkins & J. Paul Fedoroff, *Use of Penile Plethysmography in the Court: A Review of Practices in Canada, the United Kingdom and the United States*, 38 BEHAV. SCI. & LAW 79 (2020).

96. Trammell v. State, 751 N.E.2d 283, 290–91 (Ind. Ct. App. 2001); United States v. Harris, 794 F.3d 885, 890 (8th Cir. 2015).

97. United States v. Ellis, 984 F.3d 1092, 1095 (4th Cir. 2021).

98. See *infra* Part II.B for a more detailed explanation of the "reasonably related" standard.

99. *See infra* Part III.D.

What follows are some of the ways that non-carceral punishments routinely deprive people of constitutional rights but are nonetheless upheld as constitutional.

*1. First Amendment*

There are several First Amendment concerns with non-carceral punishment. First, restrictions such as internet bans, surveillance of personal electronic devices, social media account monitoring, cellphone-use limitations, and prohibitions on communicating with certain people all chill free speech.[100] Courts routinely uphold conditions of release that limit a person's right to protest,[101] associate with certain people,[102] and visit certain cultural clubs and social organizations.[103] For people convicted of certain sex offenses, possessing pornography is sometimes banned, and more general bans or restrictions on internet use are common.[104]

Second, some non-carceral punishments compel certain types of speech.[105] For example, courts have sentenced people convicted of environmental crimes (such as illegal disposal of hazardous waste) to become members of the Sierra Club.[106] Likewise, appellate courts have upheld court-ordered treatment programs, like programs aimed at people convicted of sex offenses or shoplifting, that require participants to make statements about their culpability.[107] Other programs require participants to take polygraph tests.[108] Still other programs require participants to undergo therapy and make statements

100. Weisburd, *Sentenced to Surveillance*, *supra* note 74, at 735.

101. *See, e.g.*, State v. Sahr, 470 N.W.2d 185, 194 (N.D. 1991) (fashioning probation conditions curtailing the right to protest); United States v. Lowe, 654 F.2d 562, 567 (9th Cir. 1981) (same); State v. Friberg, 421 N.W.2d 376, 380 (Minn. Ct. App. 1988) (same).

102. *See, e.g.*, WEISBURD ET AL., ELECTRONIC PRISONS, *supra* note 55, at 2; United States v. Romig, 933 F.3d 1004, 1006–07 (8th Cir. 2019) (holding restriction on engaging in certain associational activities as a special condition of supervised release was constitutional); United States v. Pacheco-Donelson, 893 F.3d 757, 762–63 (10th Cir. 2018) (same); United States v. Evans, 883 F.3d 1154, 1161 (9th Cir. 2018) (same); People v. Lopez, 78 Cal. Rptr. 2d 66, 80–81 (Cal. Ct. App. 1998) (same).

103. *See* Malone v. United States, 502 F.2d 554, 555 (9th Cir. 1974).

104. Napoli, *supra* note 93, at 77–79; Gabriel Gillett, *A World Without Internet: A New Framework for Analyzing a Supervised Release Condition that Restricts Computer and Internet Access*, 79 FORDHAM L. REV. 217, 221 (2010); Jacob Hutt, *Offline: Challenging Internet and Social Media Bans for Individuals on Supervision for Sex Offenses*, 43 N.Y.U. REV. L. & SOC. CHANGE 663, 670 (2019).

105. *See* Jaimy M. Levine, Comment, *"Join the Sierra Club!": Imposition of Ideology as a Condition of Probation,* 142 U. PA. L. REV. 1841, 1842–45 (1994) (collecting cases).

106. *Id.* at 1841–42.

107. *See, e.g.*, McKune v. Lile, 536 U.S. 24, 29 (2002) (finding that a rehabilitation program requiring admission of a crime committed was constitutional); Roman v. DiGuglielmo, 675 F.3d 204, 214–15 (3d Cir. 2012) (same); Searcy v. Simmons, 299 F.3d 1220, 1224 (10th Cir. 2002) (same).

108. *See* Ashley J. Fausset, *Answer Me or Go to Jail: Why Court Ordered Polygraph Testing to Treat Probationers Violates the Fifth Amendment*, 21 AM. U. J. GENDER, SOC. POL'Y & L. 455, 457 (2012).

about their past drug use, mental health, and crimes—raising not only First Amendment concerns, but also Fourth and Fifth Amendment concerns.[109]

Third, some non-carceral punishments raise Free Exercise Clause concerns. For example, courts generally uphold requirements to participate in AA programs.[110] As others have noted, AA programs are religious in nature and require participants to make statements about God.[111] Prohibitions on leaving residential programs and travel restrictions related to electronic monitoring or house arrest also implicate religious freedom because people cannot freely attend religious services or worship. For example, people on electronic ankle monitors in Milwaukee must obtain specific authorization to attend church and for no more than four hours once a week.[112] Conversely, some programs require participants to attend religious programming.[113]

Fourth, restrictions that limit whom people can spend time with raise freedom of association concerns. In my nationwide survey of court supervision rules, well over half of the programs limited or regulated whom people could spend time with and (or) be around.[114] Over a quarter of the programs prohibit participants from being around people with a criminal record, with a felony conviction, or who are on court supervision themselves.[115]

Some rules also limit social relationships based on vague characteristics.[116] For example, in Alabama, people on parole must "avoid persons or places of disreputable or harmful conduct or character."[117] Likewise, in Kansas, people must "avoid persons and places of harmful and/or disreputable character, including establishments whose primary source of income is from the sale of alcohol."[118]

Travel restrictions that forbid people from leaving a certain geographical area, as well as curfews and prohibitions on who is allowed into someone's

109. *See infra* Parts I.B.2–3.

110. *See* O'Connor v. State, 855 F. Supp. 303, 308 (C.D. Cal. 1994); Stafford v. Harrison, 766 F. Supp. 1014, 1018 (D. Kan. 1991); Christopher K. Smith, *State Compelled Spiritual Revelation: The First Amendment and Alcoholics Anonymous as a Condition of Drunk Driving Probation*, 1 WM. & MARY BILL RTS. J. 299, 315–18 (1992).

111. Michael G. Honeymar, Jr., *Alcoholics Anonymous as a Condition of Drunk Driving Probation: When Does It Amount to Establishment of Religion?*, 97 COLUM. L. REV. 437, 441–43 (1997); Byron K. Henry, *In "A Higher Power" We Trust: Alcoholics Anonymous as a Condition of Probation and Establishment of Religion*, 3 TEX. WESLEYAN L. REV. 443, 445–47 (1997); Derek P. Apanovitch, *Religion and Rehabilitation: The Requisition of God by the State*, 47 DUKE L.J. 785, 788–90 (1998).

112. MILWAUKEE CNTY., WIS. & JUSTICEPOINT, COMMUNITY SUPERVISION—GPS POLICIES & PROCEDURES MANUAL 7 (2016) (on file with author).

113. Appleman, *supra* note 3, at 19.

114. Weisburd, *supra* note 53, at 16–17.

115. *Id.*

116. Doherty, *Obey All Laws*, *supra* note 51, at 300–16.

117. WEISBURD ET AL., ELECTRONIC PRISONS, *supra* note 55, at 14.

118. *Id.*

home, are very common and raise similar freedom of association concerns.[119] For example, in Montgomery County, Pennsylvania, people on ankle monitors are prohibited from having more than two "visitors in [their] place of residence" per day.[120] For people subject to house arrest or electronic monitoring, attending a political rally without prior approval may be a violation of their release conditions.[121]

*2. Fourth Amendment*

Non-carceral punishments also violate the Fourth Amendment in ways that would be clearly unconstitutional if applied outside the context of punishment. There are several features of non-carceral punishments that raise Fourth Amendment concerns.

First, most forms of non-carceral punishment involve a substantial loss of privacy. Suspicionless searches of people and homes are common features of many non-carceral punishments, most notably probation and parole.[122] In my nationwide survey of rules governing various forms of court supervision, 65 percent of the programs provided for physical searches of people's homes, and of those, the vast majority did not require any level of suspicion or a warrant.[123] These searches impact not just the person on supervision, but also everyone in their household, violating what Professor David Sklansky terms "privacy as refuge."[124] There is even less privacy for people in residential programs or halfway homes. For example, the Minnesota Department of Corrections requires that halfway houses "[conduct] searches of residents, their belongings, and all areas of the facility to control contraband and locate missing or stolen property."[125]

119. *Id.* at 14, 19; *see also* Gordon Hill, *The Use of Pre-Existing Exclusionary Zones as Probationary Conditions for Prostitution Offenses: A Call for the Sincere Application of Heightened Scrutiny*, 28 SEATTLE U. L. REV. 173, 183–84 (2004) (writing about how "SOAP [Stay Out of Areas of Prostitution] orders infringe on First Amendment rights of association"); United States v. Many White Horses, 964 F.3d 825, 827 (9th Cir. 2020) ("It is well settled that a district court may impose a geographic or residency restriction when it is properly supported by the record and substantively reasonable.").

120. MONTGOMERY CNTY. ADULT PROB. & PAROLE DEP'T, PA., RULES, REGULATIONS, AND SPECIAL CONDITIONS OF ELECTRONIC MONITORING SUPERVISION 9 (2021) (on file with author).

121. Weisburd, *Punitive Surveillance*, *supra* note 2, at 178.

122. *See* Samson v. California, 547 U.S. 843, 851–52 (2006); United States v. Knights, 534 U.S. 112, 114–15 (2001); Doherty, *Obey All Laws*, *supra* note 51, at 327; John Lassetter, Samson v. California*: "Evil" Suspicionless Searches Become a Part of Everyday Life for Parolees*, 25 L. & INEQ. 539, 539–40 (2007); David M. Stout, Note, *Home Sweet Home?! Maybe Not for Parolees and Probationers When It Comes to Fourth Amendment Protection*, 95 KY. L.J. 811, 812 (2007); Tonja Jacobi & Addie Maguire, *Searches Without Suspicion: Avoiding a Four Million Person Underclass*, 48 BYU L. REV. 1769, 1771–72 (2023).

123. Weisburd, *supra* note 53, at 13.

124. David Alan Sklansky, *Too Much Information: How Not to Think About Privacy and the Fourth Amendment*, 102 CALIF. L. REV. 1069, 1113 (2014).

125. Daniel & Sawyer, *supra* note 68.

Second, non-carceral punishments also often involve various types of body searches, which are traditionally subject to Fourth Amendment constitutional scrutiny. Drug and alcohol testing, for example, are common features of non-carceral punishment.[126] Likewise, people subjected to different forms of non-carceral punishment are often required to wear alcohol-detecting bracelets (known as SCRAM) and submit DNA samples to law enforcement.[127] These are all Fourth Amendment searches that have been upheld as constitutional.[128]

Third, the various forms of electronic surveillance raise significant Fourth Amendment concerns. Near-constant location tracking (through GPS ankle monitors), as well as monitoring and searching private social media accounts and personal electronic devices like computers and cellphones, are all Fourth Amendment searches.[129] As I detail in prior work, electronic surveillance of people on court supervision allows prosecutors and law enforcement, with the click of a mouse, to access immense amounts of personal, otherwise private data at any time of day and without notice to the person subject to the surveillance.[130]

Electronic surveillance technology used to monitor people on court supervision continues to develop. In some places, GPS ankle monitors are also equipped with audio features that emanate loud beeping alerts and facilitate two-way conversations between people on the monitors and the agents monitoring them.[131] The audio features mean that anyone within earshot will be alerted to the monitor.[132] Although the Supreme Court has taken a hard line protecting people's location data,[133] those same protections are not extended to people on various forms of criminal court supervision.[134] For the most part, constitutional challenges to electronic surveillance of people on court supervision have been unsuccessful.[135]

126. WEISBURD ET AL., ELECTRONIC PRISONS, *supra* note 55, at 11; Cathryn Jo Rosen, *The Fourth Amendment Implications of Urine Testing for Evidence of Drug Use in Probation*, 55 BROOK. L. REV. 1159, 1171–78 (1990).

127. *See, e.g.*, United States v. Kriesel, 508 F.3d 941, 947 (9th Cir. 2007) (concerning DNA samples); Kopkey v. State, 743 N.E.2d 331, 338 (Ind. Ct. App. 2001) (concerning alcohol monitoring).

128. Weisburd, *Sentenced to Surveillance*, *supra* note 74, at 735.

129. *Id.* at 745–46; Weisburd, *Punitive Surveillance*, *supra* note 2, at 176–77.

130. Weisburd, *Punitive Surveillance*, *supra* note 2, at 175.

131. Kira Lerner, *Chicago Is Tracking Kids with GPS Monitors that Can Call and Record Them Without Consent*, APPEAL (Apr. 8, 2019), https://theappeal.org/chicago-electronic-monitoring-wiretapping-juveniles/ [https://perma.cc/Z8TX-9RL2]; Joshua Kaplan, *D.C. Defendants Wear Ankle Monitors that Can Record Their Every Word and Motion*, WASH. CITY PAPER (Oct. 8, 2019); WEISBURD ET AL., ELECTRONIC PRISONS, *supra* note 55, at 9.

132. WEISBURD ET AL., ELECTRONIC PRISONS, *supra* note 55, at 9.

133. *See* Carpenter v. United States, 138 S. Ct. 2206, 2217 (2018); United States v. Jones, 565 U.S. 400, 413–15 (2012) (Sotomayor, J., concurring); Riley v. California, 573 U.S. 373, 403 (2014).

134. *See* Weisburd, *Sentenced to Surveillance*, *supra* note 74, at 745–46.

135. *Id.*

*3. Fifth and Sixth Amendments*

Non-carceral punishments also implicate the right to counsel and the right against self-incrimination. Despite Fifth and Sixth Amendment concerns, courts generally uphold requirements that people on supervision write apology letters, discuss their alleged crime with probation and parole officers, or make other incriminating statements.[136] Because these admissions occur outside of the normal trial process, people are rarely provided counsel. And even if they have a lawyer, the role of defense counsel in problem-solving courts is often limited such that they are not a traditional advocate for their client.[137] Likewise, significant limits on free movement and surveillance of personal electronic devices also impact people's ability to consult with a lawyer if they have one.

*4. Substantive Due Process*

Certain interests are so fundamental that government action cannot infringe upon them "at all . . . unless the infringement is narrowly tailored to serve a compelling state interest."[138] There are several ways that non-carceral punishments implicate fundamental interests protected by substantive due process.

First, restraints on movement and liberty are perhaps the most common feature of most non-carceral punishments. People on house arrest, on electronic monitoring, or in halfway houses or residential treatment centers are generally forbidden from leaving without some form of pre-approval.[139] For example, people on electronic monitors in Louisville, Kentucky, are "required to remain inside of [their] residence at all times . . . . Inside means no decks, patios, porches, taking out the trash, etc."[140] Likewise, in Milwaukee, Wisconsin, people on monitors must get authorization to go to the grocery store (for one hour once a week), the laundromat (for two hours once a week), and to vote.[141] Bans on

136. *See* Fausset, *supra* note 108, at 458–59; *see also* United States v. Riley, 920 F.3d 200, 205–08 (4th Cir. 2019) (finding that defendant's right to receive a Miranda warning while in custody was not violated because his confession was made during a probation revocation proceeding—not a criminal proceeding); Minnesota v. Murphy, 465 U.S. 420, 440 (1984) (finding defendant "could not successfully invoke the privilege [against self-incrimination] to prevent the information he volunteered to his probation officer from being used against him in a criminal prosecution."); Ainsworth v. Stanley, 317 F.3d 1, 2 (1st Cir. 2002) (holding that non-carceral "programs [that] require participants to accept responsibility for their crimes" do not violate the Fifth Amendment).

137. Quinn, *supra* note 72, at 53–63; Tamar M. Meekins, *"Specialized Justice": The Over-Emergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm*, 40 SUFFOLK U. L. REV. 1, 38 (2006).

138. Reno v. Flores, 507 U.S. 292, 302 (1993).

139. *See* WEISBURD ET AL., ELECTRONIC PRISONS, *supra* note 55, at 6–8; *see also supra* Part I.A.

140. WEISBURD ET AL., ELECTRONIC PRISONS, *supra* note 55, at 7.

141. *Id.*

deviating from set schedules, or even taking a different route home, are also common requirements of electronic ankle monitoring.[142]

Limitations on travel and transportation methods are also common. For example, in Alaska, Washington, Vermont, and New Hampshire, people on various forms of supervision cannot operate, and in some instances purchase, a car without approval.[143] In New York City, people may be prohibited from using or entering any Metropolitan Transportation Authority subway, train, and bus for up to three years following their release.[144]

Restrictions on where, and with whom, people can live feature prominently in most forms of non-carceral punishment.[145] For example, people on electronic monitoring in Kentucky are not permitted to live in Section 8 housing or public housing. Still other programs forbid or discourage people from living in hotels, shelters, or temporary housing.[146] In many places, people are limited to only living in homes "approved" by the supervising agent.[147] Further, people cannot live with others who have a criminal record, and in some places, people must obtain permission or provide notice to their supervising agent before someone new moves into their household.[148] These restraints all burden people's liberty interests, as well as the right to bodily autonomy.

The aforementioned curfews and limits on travel—such as prohibitions on leaving, entering, or living in a certain home, city, county, or country—infringe on liberty interests. In my nationwide survey of court supervision rules, 80 percent include some form of travel ban that either forbids people from leaving a certain geographical area or requires permission before leaving.[149] This means people are prohibited from visiting family, friends, and care providers, like doctors, without first getting permission.

Second, restraints on personal and intimate relationships are common features of non-carceral punishments that implicate individual autonomy protected by substantive due process.[150] In some places, people cannot marry without the approval of their probation or parole officer,[151] a type of restriction that has been expressly rejected in the context of prisons.[152] Relatedly, people on probation for certain sex offenses in Maricopa County, Arizona, must "obtain prior written approval . . . before socializing, dating, or entering into a sexual

142. *Id.* at 6–8.
143. Weisburd, *supra* note 53, at 15.
144. *Id.*
145. WEISBURD ET AL., ELECTRONIC PRISONS, *supra* note 55, at 17.
146. Weisburd, *supra* note 53, at 15.
147. WEISBURD ET AL., ELECTRONIC PRISONS, *supra* note 55, at 17.
148. Weisburd, *supra* note 53, at 13.
149. *Id.* at 12.
150. *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 675–76 (2015); Loving v. Virginia, 388 U.S. 1, 12 (1967); Zablocki v. Redhail, 434 U.S. 374, 387 (1978).
151. WEISBURD ET AL., ELECTRONIC PRISONS, *supra* note 55, at 13–14.
152. Turner v. Safley, 482 U.S. 78, 96 (1987).

relationship with any person who has children under the age of 18."[153] And in Virginia, people on monitors are required to "inform persons with whom you have a significant relationship of your sexual offending behavior as directed by your supervising officer and/or treatment provider."[154] These restrictions limit autonomy and simultaneously reinforce the "state's interest in cultivating disciplined sexual citizens."[155]

Non-carceral punishments also impact the right to parent. For example, some courts have upheld restrictions on the ability to have children.[156] These restrictions can take different forms, including permanent sterilization, forced birth control, and general prohibitions against having children.[157] As Professor Alexis Karteron documents, common features of court supervision undermine the right to parent and result in the separation of families.[158] For example, courts routinely uphold limitations on living, visiting, or socializing with your own children[159] or other children.[160] Many programs include such rules.[161] Travel restrictions, as well as inclusion and exclusion zones, also undermine the ability of families to live together. Furthermore, these rules generally fail to recognize parents "as part of a broader network of caregivers,"[162] and in doing so, further infringe on family autonomy and caregiving cohesion. By violating the right to bodily integrity, the right to parent, and the "private realm of family life which the state cannot enter,"[163] these rights restrictions appear to be the "price of pleasure."[164]

Third, non-carceral punishments often restrict people's ability to make decisions about their own bodies. For example, mandated drug, alcohol, and mental health treatment, including treatment referred to as "moral reconation treatment,"[165] are very common, and the failure to participate can be grounds for removal from the program and potential reincarceration.[166] Random drug and

153. Weisburd, *supra* note 53, at 20.

154. *Id.*

155. Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1, 51 (2012).

156. *See* State v. Kline, 963 P.2d 697, 699 (Or. Ct. App. 1998); State v. Oakley, 629 N.W.2d 200, 214 (Wis. 2001).

157. Devon A. Corneal, *Limiting the Right to Procreate:* State v. Oakley *and the Need for Strict Scrutiny of Probation Conditions*, 33 SETON HALL L. REV. 447, 470 (2003); Catherine Albiston, *The Social Meaning of the Norplant Condition: Constitutional Considerations of Race, Class, and Gender*, 9 BERKELEY WOMEN'S L.J. 9, 10 (1994).

158. Karteron, *supra* note 59, at 652–53.

159. *Id.*; *see also* United States v. Myers, 426 F.3d 117, 125 (2d Cir. 2005); United States v. Wolf Child, 699 F.3d 1082, 1091 (9th Cir. 2012).

160. United States v. Roy, 438 F.3d 140, 144–45 (1st Cir. 2006).

161. Weisburd, *supra* note 53, at 19–20.

162. Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 387 (2008).

163. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

164. Cortney E. Lollar, *Criminalizing (Poor) Fatherhood*, 70 ALA. L. REV. 125, 164 (2018).

165. *See, e.g.*, BEXAR CNTY., TEX., MENTAL HEALTH COURT RULES (on file with author).

166. Weisburd, *supra* note 53, at 16.

alcohol tests are also customary features of non-carceral punishment.[167] Otherwise private medical and mental health records are commonly shared with treatment providers, law enforcement, and courts.[168]

Even seemingly small indignities—such as reporting the use of over-the-counter medication to a probation officer[169]—implicate bodily autonomy. Several programs also have rules related to appearance and dress.[170] In Harris County, Texas, for example, people visiting their probation officer are prohibited from wearing "revealing" clothing or clothing in "poor taste," including "halters, short shorts, sagging pants, pajamas, house shoes, swimsuits, low cut revealing shirts/blouses, [or] clothing with vulgar language."[171]

Finally, restrictions on people's ability to make decisions about their employment also raise autonomy concerns. The vast majority of non-carceral punishment programs include some sort of restriction on employment, such as requiring that people obtain permission or provide notice before changing jobs, seek approval for work schedules, and comply with limitations on work hours or the type of work they can do.[172] These restrictions, in addition to the existing challenge of finding employment with a criminal record, make it difficult to maintain financial stability and cover court-imposed fees and restitution.[173]

### *C. Cumulative Impact of Rights Violations*

Although often heralded as "decarcerative" by progressives and conservatives alike, non-carceral punishments risk reinforcing the precise racial and economic inequities that decarceration efforts seek to address. Almost all non-carceral punishment "restricts liberty, limits privacy, disrupts family relationships, and jeopardizes financial security."[174] As such, the erasure of rights furthers the racial and economic subordination endemic to the carceral state. In addressing the impact of electronic ankle monitoring, for example, Professor Chaz Arnett exposes the extent to which monitoring "entrench[es] a marginalized second-class citizenship."[175] Left unchecked, the rights restrictions associated with non-carceral punishments facilitate legalized and institutionalized dehumanization,[176] or what Professor Khiara Bridges terms

167. *Id.* at 15.
168. *Id.* at 16.
169. *See* MONTGOMERY CNTY. ADULT PROB. & PAROLE DEP'T, *supra* note 120.
170. Weisburd, *supra* note 53, at 20.
171. *Id.*
172. *Id.* at 21.
173. *See* BROOKINGS INST. & AM. ENTER. INST., A BETTER PATH FORWARD FOR CRIMINAL JUSTICE 71 (2021) (describing the challenge of finding employment after release from prison). *See generally* MONEY AND PUNISHMENT, CIRCA 2020 (Anna VanCleave, Brian Highsmith, Judith Resnik, Jeff Selbin & Lisa Foster eds., 2020) (describing fees).
174. Kilgore, Sanders & Weisburd, *supra* note 16.
175. Arnett, *supra* note 15, at 653.
176. *See* DAYNA BOWEN MATTHEW, JUST HEALTH: TREATING STRUCTURAL RACISM TO HEAL AMERICA 81–87 (2022).

"informal disenfranchisement," which refers to the "process by which a group that has been formally bestowed with a right is stripped of that very right by techniques that the Court has held to be consistent with the Constitution."[177]

While institutional anti-Black racism has always featured prominently in the functioning of the criminal legal system, oppression along other intersecting axes, such as gender, age, disability, immigration status, gender identity, sexual orientation, and housing status, are also reinforced through rights infringement.[178] Non-carceral punishments often operate as "reformist reforms" that reinforce more visibly racialized subordination and social marginalization.[179] Thanks to the efforts of activists, community organizers, researchers, and reporters, there is now a deeper understanding of the impact of rights infringements.[180]

In many respects, the various forms of non-carceral punishment mimic, even if they do not replicate, "the violence inherent in the relationship between the state and the physically incarcerated individual."[181] The deployment of non-carceral punishments reflects the ultimate "governing through crime."[182] The restrictive nature of non-carceral punishment may be even harsher than prison in some circumstances. Despite the challenge of obtaining a job or housing with a criminal record, or while wearing a visible ankle monitor, people subject to non-carceral punishment are often ordered to obtain a job, seek medical care, and find housing, all while complying with a myriad of mandated treatment programs and other requirements.[183] The way that non-carceral punishment expects people to do more with less may explain why some people prefer short terms of incarceration over more lengthy non-carceral punishments.[184]

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177. KHIARA M. BRIDGES, THE POVERTY OF PRIVACY RIGHTS 13 (2017).

178. *See* Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. REV. 1418, 1435 (2012); Liat Ben-Moshe, *The State of (Intersectional Critique of) State Violence*, 46 WSQ: WOMEN'S STUD. Q. 306, 306–07 (2018) (book review); I. India Thusi, *Harm, Sex, and Consequences*, 2019 UTAH L. REV. 159, 183–84 (2019); Ifeoma Ajunwa, *The Modern Day Scarlet Letter*, 83 FORDHAM L. REV. 2999, 3002 (2015).

179. *See* RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA 242 (2007).

180. *See The Challenging E-Carceration Project*, CHALLENGING E-CARCERATION, https://www.challengingecarceration.org/ [https://perma.cc/66GL-2QSY]; Borsuk, *supra* note 61; Document, *Supervision*, N.H. PUB. RADIO (Apr. 13, 2021), https://www.nhpr.org/podcasts/2021-04-13/listen-to-the-podcast-document-supervision [https://perma.cc/E6V2-7UX2]; The 21st Show, *Chicago Rapper, Comedian Shares His Experience On Electronic Monitor*, NPR (Apr. 15, 2021), https://will.illinois.edu/21stshow/story/mohawk-johnson-house-arrest-electronic-monitoring [https://perma.cc/W86D-KWLF]; Smith & Robson, *supra* note 85, at 2.

181. Erin Murphy, *Paradigms of Restraint*, 57 DUKE L.J. 1321, 1396 (2008).

182. *See generally* JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007) (describing how the United States has built civil and political order structured around violent crime).

183. SCHENWAR & LAW, *supra* note 15, at 15. For a vivid description of the restrictive nature of transitional programs, see Ocen, *supra* note 49.

184. *See* Klingele, *supra* note 56, at 1059 & n.188; Eric J. Wodahl, Robbin Ogle, Colleen Kadleck & Kenneth Gerow, *Offender Perceptions of Graduated Sanctions*, 59 CRIME & DELINQUENCY

Rights infringements cause both individual and collective harm. On an individual level, losing the right to move, parent, travel, speak freely, live, socialize with loved ones, or control one's own body and home undermines dignity and personal autonomy. The near-constant surveillance and limited privacy afforded to those subject to non-carceral punishment trigger related social and emotional harms.[185] As one teenager on an electric monitor explained, she could not hide the ankle monitor, and the gaze of her teachers and classmates got to her: "You're trying to move on with your life, but you have this black box around your ankle."[186]

Privacy scholars have long warned that government surveillance, as well as surveillance by private companies, chills civic engagement and civil liberties and strips people of personal agency, autonomy, and voice.[187] The lack of privacy associated with non-carceral punishment also reinforces the myriad ways that informational and intimate privacy primarily belongs to people *not* subject to non-carceral punishments.[188]

The collective harm is also significant. The erasure of rights impacts not just the person subject to carceral control but also families and communities.[189] For example, conditions that restrict parent-child relationships or ban contact with people with criminal records break families apart and "effectively cut a supervisee off from large swaths of his entire community."[190] Relatedly, for people subject to non-carceral punishment, the "home is opened up as never

1185, 1185–210 (2013); Peter Wood & Harold Grasmick, *Toward the Development of Punishment Equivalencies: Male and Female Inmates Rate the Severity of Alternative Sanctions Compared to Prison*, 16 JUST. Q. 19, 45 (1999).

185. *See* Weisburd, *Punitive Surveillance*, *supra* note 2, at 163–171; Weisburd, *Sentenced to Surveillance*, *supra* note 74, at 757.

186. SCHENWAR & LAW, *supra* note 15, at 38.

187. *See, e.g.*, Danielle Keats Citron & Daniel J. Solove, *Privacy Harms*, 102 B.U. L. REV. 793, 845 (2022); Mary Anne Franks, *Democratic Surveillance*, 30 HARV. J.L. & TECH. 425, 441 (2017); Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1935 (2013); Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1423 (2000).

188. *See, e.g.*, BRIDGES, *supra* note 177, at 89 ("In theory, the contracted Fourth Amendment fails to protect the privacy of both rich and poor alike. However, the Fourth Amendment's contraction is simply a much more relevant fact for poor individuals."); I. Bennett Capers, *Race, Policing, and Technology*, 95 N.C. L. REV. 1241, 1285 (2017) (noting "privacy has never been distributed equally"); SCOTT SKINNER-THOMPSON, PRIVACY AT THE MARGINS 16 (2021).

189. *See* Jacobi, Richardson & Barr, *supra* note 59, at 891–92; Arnett, *supra* note 15, at 644–718; Weisburd, *Punitive Surveillance*, *supra* note 2, at 165–67; James Kilgore, *Repackaging Mass Incarceration*, COUNTERPUNCH (June 6, 2014), https://www.counterpunch.org/2014/06/06/repackaging-mass-incarceration/ [https://perma.cc/94NL-Q9MH]; SCHENWAR & LAW, *supra* note 15, at 38–40.

190. Karteron, *supra* note 59, at 652.

before"[191] and exposes entire families and homes—the paradigmatic private place—to carceral surveillance.[192]

### *D. Structural Features that Facilitate Punishment Exemption*

Punishment exemption has flourished in part because of courts' historically deferential approach to evaluating rights restrictions.[193] The failure of courts to engage—much less address—punishment exemption also stems from several structural features of non-carceral punishment, features that have the effect of shielding punishment from judicial scrutiny. As a result, courts have been able to avoid resolving the constitutionality of punishment exemption.

#### *1. Barriers to Legal Challenges*

Efforts to limit litigation have made legal challenges to non-carceral punishment virtually impossible.[194] Many rights-stripping punishments exist—and expand—because people subject to non-carceral punishments, like people in prison, are deprived of the resources necessary to bring effective legal challenges.[195] Factors such as the lack of access to counsel, the difficulty of obtaining evidence, the challenges of pro se litigation, the inaccessibility of civil trial courts, and qualified immunity make constitutional challenges difficult.[196]

There are also few opportunities to meaningfully object to the rights-restricting features of non-carceral punishment. Because non-carceral punishment is often presented as an alternative to incarceration, there is no obvious opportunity to challenge the sanction, and the accused person's bargaining power is weak.[197] In the context of supervised release, people convicted of crimes "will accept nearly any arrangement as long as it provides them the opportunity to avoid going to prison."[198] When the contours of non-carceral punishment are determined by third parties, there is virtually no way to challenge the rights restrictions short of a lawsuit.[199] These barriers to legal challenges essentially immunize the rights-stripping nature of punishment from meaningful scrutiny. Put differently, punishment exemption has flourished in part because challenges to it are few and far between.

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191. Ronald Corbett & Gary T. Marx, *Critique: No Soul in the New Machine: Technofallacies in the Electronic Monitoring Movemen*t, 8 JUST. Q. 399, 401 (1991).

192. In related work, I draw on my empirical research on non-carceral punishments to expose the various ways the carceral state extends into, and transforms, the home. *See* Kate Weisburd, *The Carceral Home*, B.U. L. REV. (forthcoming) (on file with author).

193. *See infra* Part I.D.1–3.

194. Aaron Littman, *Free-World Law Behind Bars*, 131 YALE L.J. 1385, 1392–94 (2022).

195. *See id.* at 1434; David M. Shapiro, *Lenient in Theory, Dumb in Fact: Prison, Speech, and Scrutiny*, 84 GEO. WASH. L. REV. 972, 1005 (2016).

196. *See* Littman, *supra* note 194, at 1447; *see also* Anna E. Carpenter, Colleen F. Shanahan, Jessica K. Steinberg & Alyx Mark, *Judges in Lawyerless Courts*, 110 GEO. L.J. 509, 513–15 (2022).

197. *See* Weisburd, *Punitive Suveillance*, *supra* note 2, at 188–89.

198. Doherty, *Testing*, *supra* note 51, at 1704.

199. *See* Weisburd, *Punitive Surveillance*, *supra* note 2, at 158.

*2. Delegation to Third Parties*

The delegation of non-carceral punishment to third-party entities, be they private companies, nonprofits, or government agencies, also explains the lack of regulatory and constitutional protections.[200] Although courts set probation conditions, it is more often parole boards, treatment centers, specialty courts, government agents, and private companies that determine the precise contours of non-carceral punishment.[201] These entities, not courts, are responsible for rule-making, enforcement, and sanctions.

The largely unregulated and nontransparent role of private industry complicates the deference afforded to the third-party entities tasked with administering non-carceral punishment.[202] For example, in some states, probation services are outsourced to private companies—often the same companies that own and operate private prisons and electronic ankle monitoring.[203] While government entities are subject to at least some forms of judicial and regulatory oversight, albeit minimal, the same cannot be said for privately run non-carceral programs. These programs are rarely transparent about their operation, nor are they required to be as they are not governed by public records laws.[204] With limited involvement of state actors, courts' ability to monitor non-carceral programs is further curtailed.

The interests and motivations of non-court institutions that oversee non-carceral punishments—such as agencies, nonprofits, and private companies—are also not the same as those of criminal courts.[205] As Professor Eisha Jain has noted, "the organizational logic that motivates key institutions is distinct from—and often in tension with—the sentencing interests of the state."[206] Just like the concern that private prisons prioritize profits over people,[207] there is a similar concern that private companies that market, sell, and operate various forms of non-carceral punishments are motivated primarily by financial gain.

Delegation is especially troubling in "authoritarian institutions" where "serious abuses of power and violations of rights are likely to occur" and the

200. *Id.* at 153.

201. *See* Joan Petersilia, *Probation in the United States*, 22 CRIME & JUST. 149, 153 (1997); Collins, *supra* note 42, at 1594–95; Doherty, *Obey All Laws*, *supra* note 51, at 327.

202. Murphy, *supra* note 182, at 1399–400; Feeley, *supra* note 38, at 24.

203. *"Set Up to Fail:" The Impact of Offender-Funded Private Probation on the Poor*, HUM. RTS. WATCH (Feb. 20, 2018), https://www.hrw.org/sites/default/files/report_pdf/usprobation0218_web.pdf [https://perma.cc/4P4A-V8RZ]; Weisburd, *Punitive Surveillance*, *supra* note 2, at 168–70.

204. Weisburd, *Punitive Surveillance*, *supra* note 2, at 170–71.

205. Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. REV. 2029, 2094 (2011).

206. Eisha Jain, *Capitalizing on Criminal Justice*, 67 DUKE L.J. 1381, 1385 (2018).

207. *See* Timothy Williams, *Inside a Private Prison: Blood, Suicide and Poorly Paid Guards*, N.Y. TIMES (Apr. 3, 2018), https://www.nytimes.com/2018/04/03/us/mississippi-private-prison-abuse.html [https://perma.cc/N3RN-TNSL].

political process is unlikely to provide any meaningful protections.[208] As Justice Brennan warned in a dissent pertaining to restrictions on religion in prison, "we should be especially wary of expansive delegations of power to those who wield it on the margins of society. Prisons are too often shielded from public view; there is no need to make them virtually invisible."[209] The concern about expansive delegation applies to carceral institutions that exist outside of prison as well. Like barriers to legal challenges, this delegation has the net effect of judicial avoidance: courts need not resolve, much less address, punishment exemption if the issue is not before them.

*3. Lack of Regulatory Protections*

The operation and management of both carceral and non-carceral punishments are often beyond the reach of not just court oversight but other regulatory regimes and agencies that oversee certain industries, like OSHA or the FDA. In the prison setting, services related to food, medical care, and telecommunications, for example, often evade the regulatory oversight that would otherwise apply outside of prison.[210] The same concerns extend to non-carceral punishments, where halfway houses, electronic monitors, and mandated treatment programs are also under- or unregulated.[211] This is not an accident. As is true with prisons, the failure of all branches of government to regulate carceral institutions—both prisons and punishment outside of prison—reflects a "palpable hostility and contempt" towards people subjected to carceral control.[212] As a result, people subject to carceral control—be it in prison or not—are left in a "deregulatory state of exception."[213]

The private "alternatives to incarceration" industry is especially under-regulated. There are no regulations, for example, governing the production and operation of electronic ankle monitors or SCRAM devices, despite the fact that people wear these devices 24/7 on their bodies and that the devices sometimes cause physical injuries.[214] Likewise, as journalists have pointed out, state and

208. Erwin Chemerinsky, *The Constitution in Authoritarian Institutions*, 32 SUFFOLK U. L. REV. 441, 458 (1999); *see also* Sharon Dolovich, *Forms of Deference in Prison Law,* 24 FED. SENT'G REP. 245, 246 (2012) (documenting the expansive judicial deference afforded to prisons and their officials); Keramet Reiter, *Supermax Administration and the Eighth Amendment: Deference, Discretion, and Double Bunking, 1986–2010*, 5 U.C. IRVINE L. REV. 89, 103 (2015) (writing about the trend of "persistent judicial deference to the claims and assertions of prison administrators in the context of prison conditions challenges in and out of supermaxes"); Daniel Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 1014 (1999) ("Although the deference principle hovers over constitutional jurisprudence, it is explicitly invoked and practiced in a particular group of cases involving a common set of contexts[,]" including prison.).

209. O'Lone v. Est. of Shabazz, 482 U.S. 342, 358 (1987) (Brennan, J., dissenting).

210. *See* Littman, *supra* note 194, at 1391–92.

211. *See* Appleman, *supra* note 3, at 2–3.

212. Sharon Dolovich, *The Failed Regulation and Oversight of American Prisons*, 5 ANN. REV. CRIMINOLOGY 153, 155 (2022).

213. Littman, *supra* note 194, at 1390.

214. *See* Dukmasova, *supra* note 87.

federal regulators routinely ignore halfway houses and rehabilitation centers to the detriment of people in the programs.[215] The exorbitant fees for various "alternatives," combined with the profit motives of private corrections entrepreneurs, also raise concerns about potential violations of federal antitrust and antimonopoly laws.[216]

In short, there is no meaningful accountability when the operation of non-carceral punishment is fully delegated to private companies or third parties. When the state incarcerates someone in prison, the state is in theory responsible for the wellbeing, health, and safety of that person.[217] The same cannot be said of non-carceral punishments, where the wellbeing of participants rests entirely with third parties and private companies. The lack of regulatory protection, and the distance between courts and the operation of these punishments, also helps explain why punishment exemption has escaped judicial review.

## II.
## THE CASE AGAINST PUNISHMENT EXEMPTION

Having established the rights-restricting nature of non-carceral punishment, this Section makes the case that there is no doctrinal basis to exempt rights-restricting punishments from traditional constitutional review that would otherwise apply outside of the punishment context. The case against punishment exemption is most vivid in the context of non-carceral punishment, but many of the reasons to reject punishment exemption apply to prison sentences as well.

As a threshold matter, the absence of clear doctrinal support for punishment exemption stems, at least in part, from a profound disagreement about the legal origins of liberty. In a doctrinal tug-of-war, Justices Stevens, Brennan, and Marshall generally viewed liberty as an unalienable right that is not easily extinguishable. Just as an incarcerated person "[does] not shed all constitutional rights at the prison gate,"[218] neither does a person subject to non-carceral punishment upon starting their punishment. In contrast, Justices White, Rehnquist, and Thomas viewed liberty as being rightly extinguished by incarceration, and to the extent that liberty interests remain, they are derived from federal or state law creating entitlement.[219] This approach is consistent with

215. *See, e.g.*, 1A Podcast, *"American Rehab" and the Dark History of Rehabilitative Treatment*, NPR (July 9, 2020), https://www.npr.org/2020/07/09/889415007/american-rehab-and-the-dark-history-of-rehabilitative-treatment [https://perma.cc/C283-9E6X].

216. Littman, *supra* note 194, at 1421; *see also* I. Bennett Capers & Gregory Day, *Race-ing Antitrust*, 121 MICH. L. REV. 1, 14 (2023) ("Prison markets are notoriously anticompetitive because states generate revenue by outsourcing carceral markets to private firms with the promise of monopolistic control.").

217. Murphy, *supra* note 181, at 1400.

218. Sandin v. Conner, 515 U.S. 472, 485 (1995).

219. Judith Resnik, Hirsa Amin, Sophie Angelis, Megan Hauptman, Laura Kokotailo, Aseem Mehta, Madeline Silva, Tor Tarantola & Meredith Wheeler, *Punishment in Prison: Constituting the "Normal" and the "Atypical" in Solitary and Other Forms of Confinement,* 115 NW. U. L. REV. 45, 108–10 (2020).

the concept of departmentalism, in which ultimate authority in constitutional interpretation resides with "the people themselves."[220]

This debate helps explain why no court has offered a sound explanation or justification for punishment exemption. Instead, most courts examining non-carceral punishments either assume that no constitutional scrutiny applies or apply the reasonably related standard—but neither approach explains *why* traditional constitutional scrutiny does not apply. Although Justices Thomas and Scalia stated in a dissent that the Court has consistently refused to apply strict scrutiny to prison sentences,[221] and some state court judges have likewise explicitly refused to apply strict scrutiny to the deprivation of rights associated with punishment,[222] there is no solid doctrinal explanation, much less justification, for this position. This Section exposes these doctrinal infirmities.

### *A. No General "Punishment Exception" to the Constitution*

This Article's central claim is that a criminal conviction does not give the state license to impose rights deprivations as punishment so long as such deprivations are not cruel and unusual. As Justice Stevens warned in his dissent in *Samson,* there is no history of courts imposing the deprivation of Fourth Amendment rights as a "punitive measure,"[223] and as such, parole search conditions are not immune from close constitutional scrutiny.[224] This warning applies equally to all forms of punishment and is consistent with prior Supreme Court proclamations that there is "no iron curtain drawn between the Constitution and the prisons of this country."[225] There is also no such curtain between the Constitution and non-carceral punishments.

It follows that there is no textual support for punishment to escape traditional constitutional rules that would otherwise apply. Specifically, there is no suggestion, much less a clear statement, within the Constitution that punishments are exempt from normal levels of constitutional scrutiny. In fact, the Constitution's drafters used clear categorical language when addressing

220. LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 201 (2004).

221. Foucha v. Louisiana, 504 U.S. 71, 118 (1992) (Thomas, J., dissenting).

222. *See, e.g.*, State v. Oakley, 629 N.W.2d 200, 208 (Wis. 2001) (refusing to apply strict scrutiny to an anti-procreation condition of probation); State v. Talty, 814 N.E.2d 1201, 1209 (Ohio 2004) (Pfeifer, J., dissenting) (same); Commonwealth v. Power, 650 N.E.2d 87, 91 (Mass. 1995) (refusing to apply strict scrutiny to a First Amendment challenge to a probation condition); *In re* Winton, 474 P.3d 532, 535 (Wash. 2020) (refusing to apply strict scrutiny to a condition of release that limited travel).

223. *See* Samson v. California, 547 U.S. 843, 864 (2006); *infra* Part II.C.

224. A handful of scholars have suggested that probation conditions be subject to more limitations, but the doctrine has yet to change. *See* Andrew Horwitz, *Coercion, Pop-Psychology, and Judicial Moralizing: Some Proposals for Curbing Judicial Abuse of Probation Conditions*, 57 WASH. & LEE L. REV. 75, 161 (2000); Phaedra Athena O'Hara Kelly, Comment, *The Ideology of Shame: An Analysis of First Amendment and Eighth Amendment Challenges to Scarlet-Letter Probation Conditions*, 77 N.C. L. REV. 783, 786 (1999).

225. Wolff v. McDonnell, 418 U.S. 539, 555–56 (1974).

which specific rights could be infringed upon or circumscribed and why. The only two rights and privileges singled out by the Constitution's drafters as capable of being legally abridged *as punishment* are the right to vote and the right to be free from slavery and involuntary servitude.[226] Section Two of the Fourteenth Amendment provides that the right to vote may be "abridged" upon "participation in rebellion, or other crime,"[227] and the Thirteenth Amendment prohibits slavery and involuntary servitude "except as a *punishment* for crime."[228]

Extensive criticism notwithstanding, exploitative prison labor and felony disenfranchisement have been upheld as legally permissible forms of punishment.[229] To be sure, these provisions are rightly questioned and challenged,[230] and I agree with scholars and policy-makers calling for their abolition.[231] Yet under basic canons of construction, these two provisions undermine the idea that there is an *implicit* or *general* punishment exception to the Constitution.[232] The failure of the drafters to use limiting language elsewhere suggests that a conviction cannot be the sole grounds to deny people rights.

Some might argue that if the text of the Thirteenth Amendment in fact allows involuntary servitude and slavery as punishment, it follows that *any* rights deprivation as punishment is permitted under the Constitution, since "lesser" punishments are less rights depriving than enslavement. Yet even accepting the

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226. U.S. CONST. amend. XIII, § 1; *id.* amend. XIV, § 2.

227. Richardson v. Ramirez, 418 U.S. 24, 42 (1974) (upholding permanent disenfranchisement of people convicted of crimes).

228. U.S. CONST. amend. XIII, § 1 (emphasis added).

229. Beth A. Colgan, *Wealth-Based Penal Disenfranchisement*, 72 VAND. L. REV. 55, 126–27 (2019); Michael Morse, *The Future of Felon Disenfranchisement Reform: Evidence from the Campaign to Restore Voting Rights in Florida*, 109 CALIF. L. REV. 1143, 1144 (2021); Kamal Ghali, *No Slavery Except as a Punishment for Crime: The Punishment Clause and Sexual Slavery*, 55 UCLA L. REV. 607, 631 (2008); James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account*, 94 N.Y.U. L. REV. 1465, 1533 (2019); Wafa Junaid, Note, *Forced Prison Labor: Punishment for a Crime?*, 116 NW. U. L. REV. 1099, 1122–26 (2022); AM. C.L. UNION & UNIV. OF CHI. L. SCH. GLOB. HUM. RTS. CLINIC, CAPTIVE LABOR: EXPLOITATION OF INCARCERATED WORKERS 48 (2022), https://www.aclu.org/sites/default/files/field_document/2022-06-15-captivelaborresearchreport.pdf [https://perma.cc/7PCG-TUTH].

230. *See, e.g.*, Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 908 (2019); Eric J. Miller, *Foundering Democracy: Felony Disenfranchisement in the American Tradition of Voter Exclusion*, 19 NAT'L BLACK L.J. 32, 33 (2005); Junaid, *supra* note 229, at 1134.

231. *See, e.g.*, Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 105 (2019); McLeod, *supra* note 33, at 1196–97; Brakkton Booker, *Democrats Push "Abolition Amendment" to Fully Erase Slavery from U.S. Constitution*, NPR (Dec. 3, 2020), https://www.npr.org/2020/12/03/942413221/democrats-push-abolition-amendment-to-fully-erase-slavery-from-u-s-constitution [https://perma.cc/KD82-3K5H]; *Tennessee Senate OKs Bid to Remove "Slavery" as Punishment*, AP NEWS (Mar. 15, 2021), https://apnews.com/article/tennessee-us-news-slavery-bbfc5729dac6dd769c9110c284993371 [https://perma.cc/N72V-LGJ5].

232. The view that omissions are deliberate reflects the *expressio unius* canon of statutory interpretation, meaning "expressing one item of [an] . . . associated group or series excludes another left unmentioned." United States v. Vonn, 535 U.S. 55, 65 (2002).

textual support for such a position—a reading that scholars debate[233]—current punishment jurisprudence rejects slavery and "civil deaths" as punishment for a crime, addressed *infra* in Part II.B.

To be sure, the Thirteenth and Fourteenth Amendments are arguably distinguishable from other constitutional provisions because they were part of the Reconstruction compromise. As addressed more thoroughly by other scholars, the Thirteenth Amendment both ended the formal institution of slavery but also ensured the entrenchment of race- and class-based hierarchies with "Black codes," convict leasing, and other mechanisms that perpetuated slavery through the Punishment Clause.[234] Yet, if we take at face value the general view of courts that the Punishment Clause "strips convicted persons of Thirteenth Amendment protection,"[235] it follows that there is no other *general* punishment exception beyond the Punishment Clause.

Moreover, the elimination of rights for people subject to carceral control reflects the "badges and incidents of slavery"[236] that the Thirteenth Amendment forbids.[237] As discussed in greater detail in Part IV, the concerns that led to the passage of the Reconstruction Amendments directly undermine exempting punishment from traditional constitutional protections. In particular, the brutal practices of separating enslaved families and the inhuman treatment of enslaved people motivated the passage of the Reconstruction Amendments.[238] Yet today, as Professor Brandon Hasbrouck explains, liberty restrictions related to punishment strip people of "fundamental privileges and immunities of citizenship, including restrictions on speech, family relations, and legal status—all of which are textbook examples of badges and incidents of slavery."[239] For all these reasons, the Reconstruction Amendments—and in particular the Thirteenth Amendment—undermine the proposition that punishments are categorically exempt from traditional constitutional scrutiny.

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233. *Compare* Raja Raghunath, *A Promise the Nation Cannot Keep: What Prevents the Application of the Thirteenth Amendment in Prison?*, 18 WM. & MARY BILL RTS. J. 395, 439 (2009) (arguing that practice of forced labor cannot "rightfully be called punishment, for the purposes of escaping the Thirteenth Amendment's prohibitions, simply by virtue of it occurring in prison"), *with* Theodore R. Johnson, *Thank God and the GOP for the 13th Amendment*, NAT'L REV. (Nov. 19, 2015), https://www.nationalreview.com/2015/11/gop-abolition-slavery-150-anniversary/ [https://perma.cc/F36U-GYE6] (arguing for a more expansive reading of the Thirteenth Amendment that permits involuntary servitude as criminal punishment, so long as it is not cruel and unusual).

234. *See, e.g.*, SCHENWAR & LAW, *supra* note 15, at 35; Goodwin, *supra* note 230, at 935; Pope, *supra* note 229, at 1534.

235. Pope, *supra* note 229, at 1534.

236. Jones v. Mayer, 392 U.S. 409, 439 (1968).

237. Brandon Hasbrouck, *The Antiracist Constitution*, 102 B.U. L. REV. 87, 145 (2022).

238. Peggy Cooper Davis, *The Reconstruction Amendments Matter when Considering Abortion Rights*, WASH. POST (May 3, 2022), https://www.washingtonpost.com/outlook/2022/05/03/reconstruction-amendments-matter-when-considering-abortion-rights/ [https://perma.cc/Y8MK-5RSB].

239. Hasbrouck, *supra* note 237, at 145–46.

### *B. The "Right to Have Rights"*

On multiple occasions, the Supreme Court has made clear that the protections of the Free Exercise Clause, the Due Process Clause, and the Equal Protection Clause all apply to people subjected to various forms of non-carceral punishment,[240] and that people in the criminal legal system do not "forfeit all constitutional protections."[241] Despite this strong categorical language, punishment exemption persists.

There is no obvious doctrinal support for the argument that punishment or a conviction alone fully extinguishes the right to have rights.[242] As the Ninth Circuit noted, being on probation does not "extinguish" Fourth Amendment rights, and a "conditional releasee may lay claim to constitutional relief, just like any other citizen."[243] There is nothing special about state action in the form of punishment that exempts it from scrutiny. The rules of constitutional law should be the same across contexts: the relevant constitutional scrutiny should apply to all state action, regardless of whether the state action is categorized as punishment, regulation, or a collateral consequence.[244] Focusing on non-carceral punishments in particular highlights why rights-violating punishment, and exempting punishment from traditional constitutional review, is not legally justified.

There are several reasons to subject non-carceral punishment to traditional levels of constitutional scrutiny. First, simply erasing rights as punishment is a form of "civil death," defined as a "form of punishment" that "extinguish[es] most civil rights of a person convicted of a crime and largely put[s] that person outside the law's protection."[245] While civil death was a common colonial-era punishment, it is no longer accepted. In 1997, the Supreme Court held that "the ancient common law doctrine of 'outlawry,' and . . . 'civil death,' . . . could not be admitted without violating the rudimentary conceptions of the fundamental rights of the citizen."[246] Likewise, in 1977, Justice Marshall explained in a dissent that the Court has repeatedly rejected the view once held by state courts that "prisoners were regarded as 'slave(s) of the State,' having not only forfeited

240. *See* Morrissey v. Brewer, 408 U.S. 471, 482 (1972) ("[T]he liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty . . . ."); Griffin v. Wisconsin, 483 U.S. 868, 875 (1987) ("[The] degree of impingement upon [a probationer's] privacy . . . is not unlimited . . . ."); United States v. Knights, 534 U.S. 112, 119 (2001) ("Inherent in the very nature of probation is that probationers 'do not enjoy the absolute liberty to which every citizen is entitled.'") (citation and internal quotations omitted); Johnson v. California, 543 U.S. 499, 515 (2005) (holding that strict scrutiny standard governed equal protection challenge of race-based prison segregation).

241. Bell v. Wolfish, 441 U.S. 520, 545 (1979).

242. *See* Zuckerman, *supra* note 14, at 299.

243. United States v. Kincade, 379 F.3d 813, 835 (9th Cir. 2004).

244. See *infra* Part III.D.

245. Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1790 (2012).

246. Hovey v. Elliott, 167 U.S. 409, 444 (1897).

[their] liberty, but all [their] personal rights . . . ."[247] As Justice Stevens explained in a separate case:

> [I]f the inmate's protected liberty interests are no greater than the State chooses to allow, he is really little more than the slave described in the 19th century cases. I think it clear that even the inmate retains an unalienable interest in liberty at the very minimum the right to be treated with dignity which the Constitution may never ignore.[248]

This concern is not limited to prisons and applies equally to non-carceral punishments as well.

Restrictions on Second Amendment rights have garnered similar concerns about targeting and eliminating rights for people with criminal convictions.[249] For example, before joining the Supreme Court, then-Seventh Circuit Judge Amy Coney Barrett observed in a dissent that "[f]ounding-era legislatures did not strip felons of the right to bear arms simply because of their status as felons."[250] As she explained, history teaches us that "a felony conviction and the loss of all rights did not necessarily go hand-in-hand."[251] While most Second Amendment restrictions are categorized as collateral consequences or civil restraints, Justice Barrett's position suggests deep skepticism of any firearms restriction (punitive or collateral) that is triggered solely by someone's status as a "felon."[252] Of course, there is nothing exceptional about the right to bear arms as compared to other fundamental rights. In theory, Justice Barrett's concern extends to all rights and undermines the legitimacy of punishment exemption generally. At the very least, it suggests a conflict between the protection afforded to Second Amendment rights as compared to other rights.

Second, as a doctrinal matter, the loss of rights in prison, or in non-carceral settings, is most often justified because maintaining the rights would be inconsistent with the operation of the punishment. But the rights are not taken away *as the punishment itself*. As Professor Sherry Colb explains in the context of prisons, "we do not sufficiently scrutinize the penalty of incarceration as a deprivation of the fundamental right to be free from physical confinement."[253] The same can be said of non-carceral punishment. Indeed, scholars have rightly

247. Jones v. N.C. Prisoners' Lab. Union, 433 U.S. 119, 139 (1977) (Marshall, J., dissenting) (citing Ruffin v. Commonwealth, 62 Va. 790, 796 (1871)) (modifications in original).

248. Meachum v. Fano, 427 U.S. 215, 233 (1976).

249. For a detailed analysis of the tension between the right to bear arms and criminal laws limiting gun possession, see Alice Ristroph, *The Second Amendment in a Carceral State*, 116 NW. U. L. REV. 203, 230–35 (2021).

250. Kanter v. Barr, 919 F.3d 437, 451 (7th Cir. 2019), *overruled by* N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022).

251. *Kanter*, 919 F.3d at 461.

252. *See also* United States v. Rahimi, 61 F.4th 443, 448 (5th Cir. 2023) (finding that federal statute criminalizing gun possession for someone subject to a domestic violence restraining order violates the Second Amendment).

253. Colb, *supra* note 14, at 783; *see also* Zuckerman, *supra* note 14, at 309 (connecting the Due Process Clause to incarceration as a deprivation of bodily autonomy).

called for heightened constitutional scrutiny of both punishments and collateral consequences, regardless of their label as punishment or not.[254] There is nothing exceptional about criminal punishments that justifies unique constitutional treatment.[255]

Third, Supreme Court punishment and prison jurisprudence offers no clear categorical rule that exempts rights-violating punishments from traditional constitutional review. Instead, the case law reflects ongoing tension about what scrutiny is due.[256] On one hand, the Court appears to have rejected the applicability of strict scrutiny to punishment. In *Chapman v. United States*, the Court entertained a substantive due process challenge to a mandatory five-year sentence that was based on the weight of the container of drugs plus the drugs, as compared to the weight of the drugs without the container.[257] The Court rejected the challenge and upheld the sentence under rational basis review.[258] Notably, the Court did not explain why it applied rational basis review and not strict scrutiny. In one short paragraph, the Court simply explained that once a person is convicted of a crime, courts may impose whatever punishment is authorized by statute so long as it is not cruel and unusual and not irrational under rational basis review.[259]

On the other hand, *Chapman*'s legacy is as uncertain as it is unclear. In the years after *Chapman*, the Court expressed concern that any institutionalization of an adult "triggers heightened, substantive due process scrutiny"[260] and requires a "'sufficiently compelling' government interest."[261] To be sure, these concerns appear in the context of civil commitment, not criminal incarceration. For example, in striking down the ongoing civil commitment of an insanity acquittee, the majority in *Foucha v. Louisiana* distinguished civil commitment from criminal incarceration.[262] Because the commitment was civil and not criminal, the majority reasoned, substantive due process protections applied.

Yet the difference in settings does not, without more, explain why punishment should be treated differently for purposes of substantive due process analysis.[263] Indeed, in his dissent in *Foucha*, Justice Thomas worried that the majority's focus on criminal convictions was just a question of semantics. As he

254. *See* Sandra G. Mayson, *Collateral Consequences and the Preventive State*, 91 NOTRE DAME L. REV. 301, 306–09 (2015); Chin, *supra* note 245, at 1807; Zuckerman, *supra* note 14, at 309–10.

255. Sandra G. Mayson, *The Concept of Criminal Law*, 14 CRIM. L. & PHIL. 447, 448 (2020) (explaining that there is no clear consensus about what differentiates criminal law from other areas of law).

256. *See* Zuckerman, *supra* note 14, at 305 (noting that the Court has "never fully explained why incarceration does not trigger strict scrutiny").

257. 500 U.S. 453 (1991).

258. *Id.* at 467.

259. *See id.*

260. Reno v. Flores, 507 U.S. 292, 314 (1993) (O'Connor, J., concurring).

261. *Id.* at 314.

262. 504 U.S. 71, 80 (1992).

263. *See* Dudani, *supra* note 12, at 2133.

explained, "I am not sure that [a conviction] deserves talismanic significance" because "[i]t is surely rather odd to have rules of federal constitutional law turn entirely upon the *label* chosen by a State."[264] In short, the civil-criminal distinction is of limited use since substantive due process "protects bodily liberty, full stop, and one's bodily liberty is equally constrained regardless of whether the judicial order doing the work is styled as a civil or a criminal judgment."[265]

In the equal protection context, the Supreme Court has also applied strict scrutiny to prisons, suggesting that *Chapman* is not the final word on the legality of exempting punishment from traditional standards of constitutional review. In evaluating a Section 1983 equal protection challenge to prison policies that discriminated based on race, the Court explicitly held that strict scrutiny and not the reasonably related standard governed the challenge.[266]

To be sure, there is debate in the law and literature about what precise constitutional review is due,[267] but at a minimum, these cases all reveal that criminal punishment—both in prison and out—is not *per se* exempt from constitutional scrutiny and that there is no obvious reason *not* to apply traditional constitutional scrutiny to punishments.[268]

Reading the cases this way is not novel. Justices Marshall and Brennan also believed that the traditional levels of constitutional scrutiny that apply to any state action should apply to state action in prison. In a dissent related to a freedom of association claim, Justice Marshall urged the Court to view restrictions on First Amendment activities the same for people in prison and outside.[269] In a dissent regarding restrictions of religious practices in prison, Justice Brennan likewise took the position that such restrictions should be subject to a "strict standard of review."[270]

These points, however, raise a follow-up question: if traditional constitutional scrutiny applies to non-carceral punishment, why have courts avoided doing just that? In 2001, the Wisconsin Supreme Court offered a possible explanation. In upholding an anti-procreation probation condition, the

264. *Foucha*, 504 U.S. at 118 n.13 (Thomas, J., dissenting). "Concededly, Justice Thomas's objection was limited": he "believed that a person's criminal *conduct*—irrespective of whether she was convicted or acquitted as insane—extinguished her right against unwarranted confinement." Dudani, *supra* note 12, at 2133.

265. Zuckerman, *supra* note 14, at 311.

266. Johnson v. California, 543 U.S., 499, 515 (2005).

267. *See e.g.*, Zuckerman, *supra* note 14, at 306 (concluding that, although incorrect, the Court has articulated rational basis as the appropriate standard of review of incarceration); Dudani, *supra* note 12, at 2134 (arguing that strict scrutiny is the appropriate standard to challenge incarceration).

268. Other examples of the Court applying constitutional law to criminal punishments are explored *infra* in Part II.E.

269. *See* Jones v. N.C. Prisoners' Lab. Union, 433 U.S. 119, 141–42 (Marshall, J., dissenting) (observing that with respect to First Amendment analysis, "I do not understand why a different rule should apply simply because prisons are involved").

270. O'Lone v. Est. of Shabazz, 482 U.S. 342, 357 (Brennan, J., dissenting).

court in *State v. Oakley* noted, without citation to authority, that neither probation conditions nor prison regulations are subject to strict scrutiny review.[271] The court explained its reasoning:

> If probation conditions were subject to strict scrutiny, it would necessarily follow that the more severe punitive sanction of incarceration, which deprives an individual of the right to be free from physical restraint and infringes upon various other fundamental rights, likewise would be subjected to strict scrutiny analysis. . . . [This] position is either illogical in that it requires strict scrutiny for conditions of probation that infringe upon fundamental rights but not for the more restrictive alternative of incarceration, or it is unworkable in that it demands the State meet the heavy burden of strict scrutiny whenever it is confronted with someone who has violated the law.[272]

Yet this explanation is suspect. It is hardly illogical to suggest that strict scrutiny applies to both carceral and non-carceral sentences. Both, after all, involve state action and the deprivation of liberty, just to different degrees. Likewise, the unworkable explanation seems to suggest, as Justice Brennan famously put it, a "too much justice" problem.[273] Simply because applying traditional constitutional scrutiny would be difficult is not, without more, a sufficient justification to not do so. Perhaps the real reason courts avoid applying traditional constitutional scrutiny to punishment is that it opens the floodgates to constitutional challenges and might result in substantially limiting the State's ability to punish people with both carceral and non-carceral sanctions. In this way, courts' reliance on the consent of people convicted of crimes, as well as deference to agencies and private companies, should be viewed as forms of judicial avoidance.

To be sure, a small handful of courts reject the idea of punishment exemption and have instead applied heightened levels of constitutional scrutiny to non-carceral punishments. For example, then-Second Circuit Judge Sonia Sotomayor invalidated a supervised release condition that limited a parent's ability to visit with his child on the grounds that "the liberty interest at stake is fundamental" and "a deprivation of that liberty is 'reasonably necessary' only if the deprivation is narrowly tailored to serve a compelling government interest."[274] A handful of courts followed suit in the context of family relationships, but they are the exception and not the norm.[275]

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271. 629 N.W.2d 200, 214 (2001).

272. *Id.* at 207 n.23 (internal citations omitted).

273. McCleskey v. Kemp, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting).

274. United States v. Myers, 426 F.3d 117, 126 (2d Cir. 2005).

275. *See* Goings v. Ct. Servs. & Offender Supervision Agency for D.C., 786 F. Supp. 2d 48, 70–71 (D.D.C. 2011) (applying strict scrutiny to a no contact provision related to a defendant's ability to see their children); United States v. Reeves, 591 F.3d 77, 82–83 (2d Cir. 2010) (applying heightened scrutiny to a supervised release condition requiring a defendant to notify the probation department if he enters a "significant romantic relationship"); Simants v. State, 329 P.3d 1033, 1039 (Alaska Ct. App. 2014) (applying heightened scrutiny to a probation condition that barred a woman from living with her

Notably, most of the cases that apply strict or heightened scrutiny to non-carceral punishments involve more extreme rights restrictions, such as prohibitions on having children, complete internet bans, or mandatory penile plethysmographs.[276] Another small group of judges have subjected religious restrictions and speech restrictions to heightened scrutiny.[277] But these cases are outliers and inexplicably apply heightened scrutiny to some restrictions and strict scrutiny to others.[278] Nonetheless, these cases—many of them state court decisions—suggest that rights restrictions imposed as punishment are not categorically exempt from close constitutional scrutiny.

The vast majority of courts confronted with challenges to non-carceral punishments, however, either avoid the constitutional questions altogether, uphold restrictions that "reasonably relate" to a purpose of punishment (a form of rational basis review), or explicitly refuse to apply traditional constitutional scrutiny.

### *C. Prohibition on Punishments that Ruin People and Undermine Dignity*

Rights-violating punishments also conflict with both Eighth Amendment and substantive due process jurisprudence that speaks to dignity interests and personal ruin. While scholars have understandably questioned the continued viability of both substantive due process and Eighth Amendment challenges to various forms of punishment, a close reading of recent case law reveals reason to think otherwise.

In the context of the Eighth Amendment, two recent cases suggest a prohibition on punishments that ruin people. The Supreme Court's decisions in both *United States v. Bajakajain* and *Timbs v. Indiana* reflect a recognition that punishment is not meant to leave a person in a worse condition by depriving them of basic rights, liberty, and autonomy.[279] Although both cases focus on the

own child); Doe v. Lima, 270 F. Supp. 3d 684, 702 (S.D.N.Y. 2017) (applying strict scrutiny to a condition barring contact with son).

276. *See supra* notes 93–97; *see also* United States v. Voelker, 489 F.3d 139, 145 (3d Cir. 2007) (applying heightened scrutiny to a supervised release condition imposing a "lifetime ban on all computer equipment and the internet"); United States v. McLaurin, 731 F.3d 258, 261, 263 (2d Cir. 2013) (applying heightened scrutiny to a five-year supervised release condition imposing subjection to penile plethysmography examinations at the probation officer's discretion).

277. *See* United States v. Hernandez, 209 F. Supp. 3d 542, 544–46 (E.D.N.Y. 2016) (applying heightened scrutiny to condition prohibiting plaintiff from attending religious services with minors); Galindo v. State, 481 P.3d 686, 691, 693 (Alaska Ct. App. 2021) (applying heightened scrutiny to condition prohibiting participation in a march); Sobell v. Reed, 327 F. Supp. 1294, 1303–05 (S.D.N.Y. 1971); State v. Evans, 796 P.2d 178, 179–80 (Kan. Ct. App. 1990) (applying strict scrutiny to condition requiring "attendance at a specific church").

278. *Compare Lima*, 270 F. Supp. 3d at 702 (applying strict scrutiny), *with Galindo*, 481 P.3d at 691 (holding that a condition must be "narrowly tailored to avoid unnecessary interference with the constitutional right at issue" (internal quotations omitted)).

279. United States v. Bajakajian, 524 U.S. 321, 339 (1998) (addressing when a fine or forfeiture is excessive under the Eighth Amendment); Timbs v. Indiana, 139 S. Ct. 682, 691 (2019) (holding that the Fourteenth Amendment incorporates the Eighth Amendment's Excessive Fines Clause to the states).

scope of the Eighth Amendment, the decisions aimed to limit "punishment powers to exploit and undermine individuals . . . , to 'retaliate or chill' speech, or otherwise to abuse people."[280] As Professor Judith Resnik explains, *Timbs* suggests an "anti-ruination principle," which is the idea that "state punishment has to preserve (rather than diminish) people's capacities to function physically, mentally, and socially, even as governments may also aim to deter, incapacitate, be retributivist, rehabilitative, protect institutional safety, and minimize costs."[281]

The anti-ruination principle can be traced back further than *Timbs* and beyond the Eighth Amendment. In rejecting the view that the Eighth Amendment is the only limit on punishment, Justice Stevens explained that "it remains true that the 'restraints and the punishment which a criminal conviction entails do not place the citizen beyond the ethical tradition that accords respect to the dignity and intrinsic worth of every individual.'"[282]

The rights deprivation associated with non-carceral punishment does precisely what Professor Resnik warns against: it diminishes a person's ability to function physically, mentally, and socially. Instead, as suggested by Justice Stevens, punishment should preserve certain aspects of a person's liberty and dignity. Depriving people in prison of pictures of their loved ones, for example, "may mark the difference between slavery and humanity" and does not "comport with any civilized standard of decency."[283] Likewise, in the context of the decades-long California prison condition cases, Judge Thelton Henderson explained that when prisons deprive people "of a basic necessity of human existence[,] . . . they have crossed into the realm of psychological torture."[284] The same analysis can and should apply in the context of non-carceral punishments.

Both the Eighth Amendment and substantive due process also speak to dignity interests—interests undermined by many of the rights-restricting non-carceral punishments. In many of the early reproductive health care cases, for example, the Supreme Court spoke about the Fourteenth Amendment's liberty guarantee as respecting personal autonomy as well as dignity.[285] Dignity interests—as part of substantive due process—appear in a range of cases, including the right to refuse life-sustaining medical care and the right to privacy

280. Judith Resnik, *(Un)Constitutional Punishments: Eighth Amendment Silos, Penological Purposes, and People's "Ruin*,*"* 129 YALE L.J.F. 365, 367–68 (2020).

281. *Id.* at 408.

282. Overton v. Bazzetta, 539 U.S. 126, 138 (2003) (Stevens, J., concurring) (citation omitted).

283. Hudson v. Palmer, 468 U.S. 517, 542, 546 (1984).

284. Madrid v. Gomez, 889 F. Supp. 1146, 1264 (N.D. Cal. 1995).

285. *See* Luke A. Boso, *Dignity, Inequality, and Stereotypes*, 92 WASH. L. REV. 1119, 1128 (2017); Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 YALE L.J. 1694, 1701–06 (2008).

with respect to sex and sexuality.[286] To be sure, post-*Dobbs v. Jackson Women's Health Organization*, the ongoing viability of these cases is unknown, an issue addressed *infra* in Part IV.

The concern with dignity is not limited to the Fourteenth Amendment. Eighth Amendment jurisprudence also invokes dignity as an organizing principle by which to evaluate punishment.[287] As Justice Brennan famously noted, "punishment must not be so severe as to be degrading to the dignity of human beings."[288] In concluding that handcuffing someone to a hitching post for seven hours and not letting them use the bathroom violated the Eighth Amendment, the Court explained that the punishment was "antithetical to human dignity" and emphasized that the "basic concept underlying the Eighth Amendment . . . is nothing less than the dignity of man."[289] In that case, the Court found that the prison's inability to meet basic human needs is a feature of punishment that undermines dignity and thus violates the Eighth Amendment.[290] As explored more fully in related work, punishments that may not amount to torture and could be justified as reasonably related to rehabilitation or deterrence—for example, requirements to urinate in front of a state official as part of a drug test or limits on parenting—could still raise significant dignity concerns.[291]

A historical reading of the Eighth Amendment also supports the proposition that the right against cruel and unusual punishment means more than the right to not be tortured. Under the original meaning of "unusual," punishments were presumed unjust if they "attempted to replace 'reasonable' punishment practices that had developed over a very long period of time with something that was either new, foreign, or previously tried and then rejected."[292] Arguably, some forms of non-carceral punishments are sufficiently "unusual" so as to justify Eighth Amendment protection.

### *D. Reasons to Reject the Reasonably Related Standard*

Punishment exemption is very much fueled by courts' deferential approach to reviewing rights-restricting punishment.[293] Generally, courts either ignore the rights-stripping nature of punishments or uphold rights restrictions that

286. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 567 (2003); Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 289 (1990); Obergefell v. Hodges, 576 U.S. 644, 663 (2015).

287. Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 223 (2011); JONATHAN SIMON, MASS INCARCERATION ON TRIAL 165–67 (2014).

288. Furman v. Georgia, 408 U.S. 238, 271 (1972) (Brennan, J., concurring).

289. Hope v. Pelzer, 536 U.S. 730, 738, 745 (2002).

290. *Id.* at 738.

291. Weisburd, *Punitive Surveillance*, *supra* note 2, at 152, 200 (describing how electronic monitoring undermines basic notions of dignity).

292. John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1745–46 (2008).

293. *See* Sharon Dolovich, *The Coherence of Prison Law*, 135 HARV. L. REV. F. 302, 311 (2022) (stating "[i]t is hard to conceive of a more deferential standard").

reasonably relate to rehabilitation or public safety.[294] For example, restrictions that implicate First Amendment rights (such as mandatory participation in AA or restrictions on movement that implicate the ability to protest or practice religion) or restrictions on family and social relationships are routinely upheld under a reasonably related justification.[295] A condition requiring a person on probation to seek permission from his probation officer before "engaging in sexual relationship[s]" was also upheld as reasonably related to rehabilitation.[296] Likewise, at the height of the COVID-19 pandemic, a federal district court judge ordered that a probationer receive a COVID-19 vaccine on the grounds that it reasonably related to public safety.[297]

This Section takes on the reasonably related standard and makes the case that it does not justify exempting non-carceral punishment from traditional constitutional scrutiny.

### *1. Limitless Limit*

The reasonably related standard is not random. It migrated from prison jurisprudence to non-carceral jurisprudence with little adaptation for the differences between carceral and non-carceral settings. In the prison context, most rights restrictions are upheld so long as the burdens are "reasonably related to legitimate penological interests,"[298] including rehabilitation and public safety.[299]

This standard, most forcefully articulated in *Turner v. Safley*, is meant to be a balancing test between the restrictions on rights on one hand, and the needs of the prison on the other. In practice, it is a "species of rational basis review" that is highly deferential to prison officials and creates a "presumption of constitutionality."[300] As applied in both the context of prisons and non-carceral punishments, this standard is trans-substantive: this default applies regardless of

294. *See, e.g.*, United States v. Schave, 186 F.3d 839, 843 (7th Cir. 1999) ("[A] court will not strike down conditions of [supervised] release, even if they implicate fundamental rights, if such conditions are reasonably related to the ends of rehabilitation and protection of the public from recidivism.").

295. *See, e.g.*, United States v. Romig, 933 F.3d 1004, 1007 (8th Cir. 2019) (upholding prohibition on associating with any member of a motorcycle gang did not infringe on freedom of association because it was reasonably related to the sentencing factors); United States v. Pacheco-Donelson, 893 F.3d 757, 763 (10th Cir. 2018) (same); United States v. Evans, 883 F.3d 1154, 1164–65 (9th Cir. 2018) (same); People v. Lopez, 78 Cal. Rptr. 2d 66, 73 (Cal. Ct. App. 1998) (holding a probation condition prohibiting gang association was reasonably related to rehabilitation and prevention of future criminality).

296. Krebs v. Schwarz, 568 N.W.2d 26, 28 (Wis. Ct. App. 1997).

297. *See* Madison Alder, *N.Y. Federal Judge Orders Defendant Vaccinated as Bail Condition*, BLOOMBERG L. (Aug 18, 2021), https://news.bloomberglaw.com/us-law-week/n-y-federal-judge-orders-defendant-vaccinated-as-bail-condition [https://perma.cc/5CY9-U7LD].

298. Turner v. Safley, 482 U.S. 78, 89 (1987).

299. *See* Dolovich, *supra* note 208, at 251; Resnik, *supra* note 280, at 367–68.

300. Dolovich, *supra* note 293, at 311.

the particular right.[301] Even when courts emphasize the need to proceed with caution when punishments strip people of rights, the final analysis is strikingly similar across all rights and settings: the erasure of rights survives so long as it is "primarily designed to affect the rehabilitation of the probationer or insure the protection of the public."[302]

In contrast, courts are much more concerned with the erasure of rights that occur *outside* of punishment. For example, in *Grady v. North Carolina* and *Packingham v. North Carolina*, the Supreme Court recognized the rights-restricting nature of lifetime GPS monitoring and internet bans for people convicted of certain sex offenses.[303] However, the Court's concerns hinged on the fact that the restrictions were imposed on people who "already . . . served their sentence and are no longer subject to the supervision of the criminal justice system."[304] Lower courts have likewise declined to apply *Grady* and *Packingham* to people still serving a criminal sentence, reasoning that restrictions on First and Fourth Amendment rights are more troubling when they extend "beyond the completion of [the defendant's] sentence"[305] and that those still subject to state punishment are not afforded the same protections.[306] The difference in courts' concern with the deprivation of rights in the punishment setting as compared to the non-punishment setting is striking and reinforces this Article's claim that the right to have rights should depend on the existence of state action, regardless of the setting.

The most obvious concern with the deferential reasonably related standard is that it imposes no clear outer limit. Rights restrictions are almost always justifiable as protecting public safety or furthering rehabilitation.[307] In his dissent in *Turner*, Justice Stevens critiqued the reasonably related justification on these grounds: if the standard is nothing more than a "*logical* connection" between the

301. *See* Driver & Kaufman, *supra* note 12, at 537–38.

302. United States v. Consuelo-Gonzalez, 521 F.2d 259, 265 n.14 (9th Cir. 1975).

303. Grady v. North Carolina, 575 U.S. 306, 310 (2015); Packingham v. North Carolina, 582 U.S. 98, 107–08 (2017).

304. *Packingham*, 582 U.S. at 108 (striking down on First Amendment grounds an internet ban for people convicted of certain sex offenses); State v. Grady, 831 S.E.2d 542, 559–60 (N.C. 2019) (noting that Fourth Amendment concerns are heightened with "respect to unsupervised individuals like defendant who, unlike probationers and parolees, are not on the 'continuum of possible [criminal] punishments'").

305. United States v. Browder, 866 F.3d 504, 511 n.26 (2d Cir. 2017); *see also Grady*, 831 S.E.2d at 559–60; Friedman v. Boucher, 580 F.3d 847, 858 (9th Cir. 2009) (finding that nonconsensual DNA collection was unreasonable because "Friedman was not on parole" given that "[h]e had completed his term of supervised release successfully and was no longer [under] the supervision of any authority").

306. *See Browder*, 866 F.3d at 511 n.26; *see also* United States v. Halverson, 897 F.3d 645, 658 (5th Cir. 2018) (finding that "*Packingham* does not—certainly not 'plainly'—apply to the supervised-release context"); United States v. Rock, 863 F.3d 827, 831 (D.C. Cir. 2017) (noting that *Packingham* does not apply to a supervised-release condition because such a condition "is not a post-custodial restriction of the sort imposed on Packingham").

307. *See* Chemerinsky, *supra* note 208, at 459–61.

oppressive regulation and any "legitimate penological concern perceived by a cautious warden, . . . it is virtually meaningless."[308]

This deferential standard is hardly surprising, as it tracks punishment jurisprudence more broadly. As Professor Sharon Dolovich observes, prison law is "predictably pro-state, highly deferential to prison officials' decision-making, and largely insensitive to the harms people experience while incarcerated."[309] The same concern extends to the deference afforded to non-carceral punishments as well. Yet despite uniform scholarly criticism of the *Turner* standard, most courts continue to adopt this approach in evaluating rights deprivations in prisons and for people subject to various forms of court supervision.[310]

*2. Legally Unsound*

The problem with the reasonably related standard is not just its limitlessness but also its legal insufficiency in two significant ways. First, there is no clear explanation as to *why* courts apply this deferential standard in a trans-substantive way to all rights restrictions and without regard to the specific right involved. As Professors Emma Kaufman and Justin Driver observe in the context of prison law, applying the same standard to all rights is a clear departure from traditional constitutional analysis that adjusts the scrutiny standard based on the distinct rights at issue.[311] The result is an "oversimplified constitutional analysis" that fails to appreciate the differences between constitutional rights.[312] Of course, the differences between rights generally matter in constitutional analysis, and there is no compelling justification to not recognize those differences in the context of punishment.[313]

Second, courts' treatment of the rehabilitative justification is often contradictory.[314] On one hand, the Supreme Court has explicitly rejected rehabilitation as a justification for harsh punishments. For example, in *Tapia v. United States*, the Court unanimously invalidated a district court's decision to impose a longer prison term so that the defendant could partake in a "500 Hour Drug Program."[315] Writing for the Court, Justice Kagan explained that it was improper for the court to sentence the defendant "for the purpose of rehabilitating [her] or providing [her] with needed educational or vocational training."[316]

308. Turner v. Safley, 482 U.S. 78, 100 (1987) (Stevens, J., concurring in part and dissenting in part) (internal citations omitted).

309. Dolovich, *supra* note 293, at 302.

310. *See* Dolovich, *supra* note 208, at 245; Driver & Kaufman, *supra* note 12, at 573; Shapiro, *supra* note 195, at 989–94; Karteron, *supra* note 59, at 685–86; Jamelia N. Morgan, *Reflections on Representing Incarcerated People with Disabilities: Ableism in Prison Reform Litigation*, 96 DENV. L. REV. 973, 982–85 (2019); Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1606 (2003).

311. Driver & Kaufman, *supra* note 12, at 537–38.

312. *Id.* at 572.

313. *See id.* at 576.

314. *See id.* at 566.

315. 564 U.S. 319, 334–35 (2011).

316. *Id.* at 329–30.

Although the case concerned the Sentencing Reform Act, the decision reflects the Court's skepticism that rehabilitation is a basis to impose a punishment. The Court has also recognized that harsh treatment, like solitary confinement, is not rehabilitative and cannot be justified as such.[317]

On the other hand, the Supreme Court, as well as lower courts, continues to selectively invoke rehabilitation as a justification for applying the reasonably related standard, despite simultaneously recognizing its shortcomings. Book bans and visitation restrictions in prison, for example, have been upheld as reasonably related to rehabilitation.[318] The Supreme Court also invoked rehabilitation when it rejected a Fifth Amendment challenge to a sex offender treatment program that required participants to admit guilt.[319] In short, courts often find that rehabilitation trumps constitutional rights.[320] This inconsistent approach suggests the legal infirmity of the rehabilitation justification.

### *3. Inapplicable to Non-Carceral Punishment*

Another reason to reject the reasonably related standard is that it does not easily translate to the non-carceral setting.[321] On the most basic level, the deprivation of rights should only occur if it is incidental to the administration of the program. In prison, it is prison walls that limit liberty. Likewise, the erasure of First and Fourth Amendment rights in prison is often upheld on the grounds that it "is necessary, as a practical matter, to accommodate a myriad of 'institutional needs and objectives' of prison facilities, . . . chief among which is internal security."[322] The deference afforded to prison officials in restricting rights reflects the view that because of the "dangers of prison life, prison officials need[] a free hand in the daily running of their facilities and in crafting institutional policy."[323]

In contrast, the same security concerns and institutional needs do not apply to non-carceral punishment.[324] Deference to correctional needs is *not* applicable in the non-carceral punishment setting. As Justice Stevens explained in the

317. *See* Wilkinson v. Austin, 545 U.S. 208 (2005); Driver & Kaufman, *supra* note 12, at 561.

318. *See* Beard v. Banks, 548 U.S. 521, 532–33 (2006); Overton v. Bazzetta, 539 U.S. 126, 138 (2003).

319. McKune v. Lile, 536 U.S. 24, 31–31, 47–48 (2002).

320. *See* Driver & Kaufman, *supra* note 12, at 565.

321. *See* Karteron, *supra* note 59, at 684.

322. Hudson v. Palmer, 468 U.S. 517, 524 (1984) (internal citations omitted); *see also Overton*, 539 U.S. at 138 (upholding family visiting restrictions based on state's interest in prison security); Bell v. Wolfish, 441 U.S. 520, 547 (1979) ("Prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security."); Jones v. N.C. Prisoners' Lab. Union, 433 U.S. 119, 132 (1977) (upholding prison rule that prohibited a prison labor union because the union "would be detrimental to order and security in the prisons"); *Beard*, 548 U.S. at 521 (upholding prison restriction on newspapers, magazines and photos on the basis of prison security).

323. Dolovich, *supra* note 212, at 166.

324. *See* Samson v. California, 547 U.S. 843, 862–63 (2006) (Stevens, J., dissenting); Karteron, *supra* note 59, at 684.

context of probation and parole searches, the *Safley* standard "cannot be mapped blindly" onto non-carceral punishments.[325] Unlike in prison where limited privacy may be needed to accommodate "institutional needs," such as the "safety of inmates and guards, 'internal order,' and sanitation," these concerns "manifestly do not apply to parolees"[326] or, for that matter, anyone on court supervision.

Some might argue that there are separate security needs for people convicted of crimes who are not in prison. However, as discussed *infra* in Part IV.A, those needs can be addressed in narrower ways.

### *E. Courts Concede the Need for Constitutional Scrutiny*

Another reason to reject punishment exemption is that courts appear to concede that non-carceral punishment is not categorically immune from all forms of constitutional scrutiny. There are four primary examples of courts acknowledging that rights-stripping punishments are subject to at least some constitutional review.

First, the reasonably related standard, described *supra* in Part II.D*,* demonstrates that punishment is not categorically immune from constitutional scrutiny. If it were, there would be no need to apply the reasonably related standard. And certainly, if punishment exemption was doctrinally accepted, there would be no obvious explanation for why some courts—albeit a small minority—have in fact applied strict scrutiny to some punishments.[327] The problem is not the lack of *any* constitutional review; rather, there is no obvious doctrinal explanation for exempting rights-restricting punishment from the constitutional scrutiny that would apply outside the punishment context. But the mere existence of the reasonably related standard, despite its significant shortcomings, undermines the legality and legitimacy of exempting punishment from constitutional rules.

Second, the Fourth Amendment scrutiny applied to non-carceral punishments, such as probation or parole searches, also demonstrates that punishment is subject to at least some constitutional scrutiny. In *Samson* and *Knights*, the Court applied a Fourth Amendment "reasonableness" analysis in upholding searches of people on parole and probation.[328] Even though these cases resulted in fewer privacy protections for people on court supervision, it was not because the searches were immune from constitutional scrutiny. If searches could legally be imposed as punishment, there would be no need to determine if the searches are reasonable under the Fourth Amendment.

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325. *Samson*, 547 U.S. at 863 (Stevens, J., dissenting).

326. *Id.* at 862–63 (internal citations omitted).

327. *See supra* Part II.A.

328. United States v. Knights, 534 U.S. 112, 121 (2001); *Samson*, 547 U.S. at 844 (majority opinion).

Third, as described in more detail below, courts' conspicuous reliance on people's consent to justify the deprivation of rights suggests that courts are indeed aware of constitutional limits on punishment. Were courts able to simply impose whatever punishment they saw fit (so long as it did not violate the Eighth Amendment), they would have no need to rely on consent. But that is not the case. Instead, courts often invoke and rely on consent and thereby avoid addressing constitutional questions.

Fourth, the Court has acknowledged in two separate cases that punishment is not categorically immune from substantive due process scrutiny.[329] In *Cooper Industries v. Leatherman Tool Group*, the Court explicitly stated that substantive limits apply to punishment in both the criminal and civil context: "Despite the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages, the Due Process Clause . . . imposes substantive limits on that discretion."[330] Likewise, in *BMW v. Gore*, the court also recognized that substantive due process limits criminal punishment.[331] There is no obvious doctrinal explanation as to why substantive due process would not similarly apply in the context of criminal punishments that infringe on fundamental rights.

## III.
## ANSWERING ANTICIPATED OBJECTIONS

### *A. Prison Is Worse yet Perfectly Legal*

Exempting punishment from traditional constitutional scrutiny is very much driven by courts' evaluating the deprivations of rights through the comparative lens of prison, which is the archetypal form of incarceration and punishment.[332] For example, in *Samson*, Justice Stevens observed that the majority "seems to assume" that if a person "may be subject to random and suspicionless searches in prison . . . then he cannot complain when he is subject to the same invasion outside of prison, so long as the State still can imprison him."[333]

The reasoning of the majority in *Samson* is no anomaly. Because traditional prisons "serve as the touchstone of constitutional scrutiny,"[334] courts often view anything less restrictive than prison as categorically constitutional. For example, an Illinois court upheld a probation condition requiring the defendant to obtain pregnancy tests because the court had "difficulty seeing how a minor, routine

329. *See* Bambauer & Roth, *supra* note 14, at 1679.
330. 532 U.S. 424, 433 (2001).
331. 517 U.S. 559, 568 (1996).
332. Murphy, *supra* note 181, at 1347.
333. *Samson*, 547 U.S. at 864 (Stevens, J., dissenting).
334. *Id.*

blood test conducted every two months could be more intrusive upon defendant than six months in jail."[335]

Yet, it is legally unsound to conclude that anything less restrictive than prison is *per se* constitutional. As the Ohio Supreme Court stated, simply because the state "might have incarcerated a defendant does not, in itself, justify" the imposition of any restriction that would have also applied in prison.[336] In that case, the court was reviewing an anti-procreation probation condition and pointed out that while the government interest in maintaining security of a prison might justify such a restriction in prison, the same government interest does not apply in the context of probation.[337] Likewise, in striking down denaturalization as a punishment for a crime, the U.S. Supreme Court noted that "the death penalty is not a license to the Government to devise any punishment short of death within the limit of its imagination."[338] Presumably, a non-carceral punishment that forbids people from attending religious services or visiting with loved ones should be considered unconstitutional, even if those same rights are limited in prison. As the dissenting justice on the Wisconsin Supreme Court explained with respect to the anti-procreation condition in *Oakley*, "[w]hile the State has chosen not to exercise control over Oakley's body by depriving him of the freedom from restraint, it does not necessarily follow that the State may opt to exercise unlimited control over his right to procreate."[339] In short, the fact that prison is more restrictive and strips people of more rights, does not—without more—justify the same invasions associated with non-carceral punishment.

### *B. But for Non-Carceral Punishments, People Would Be Imprisoned*

Exempting non-carceral punishment from traditional constitutional scrutiny is often either implicitly or explicitly justified on the assumption that *but for* a given non-carceral punishment, the same person would otherwise be incarcerated. Since non-carceral punishment is preferable to prison, the argument goes, there is no need for constitutional scrutiny. There are two key problems with this assumption.

First, in a world without non-carceral punishments, there is no convincing evidence that the same people would otherwise be incarcerated. Some may, but many would or should not. It is difficult, if not impossible, to empirically measure the impact of non-carceral punishments on incarceration rates.

Second, and relatedly, the claim that people would otherwise be incarcerated assumes that the alternative is prison, not freedom. Yet, for low-level crimes or people charged with crimes for the first time, it is likely that a judge would not—or at least *should not*—impose a traditional carceral sentence

335. People v. Ferrell, 659 N.E.2d 992, 995–96 (Ill. App. Ct. 1995).
336. State v. Talty, 814 N.E.2d 1201, 1206 (Ohio 2004).
337. *Id.*
338. Trop v. Dulles, 356 U.S. 86, 99 (1958).
339. State v. Oakley, 629 N.W.2d 200, 218 (Wis. 2001) (Bradley, J., dissenting).

even if non-carceral punishments did not exist. Conversely, some non-carceral punishments, like parole and federal supervised release, are never substitutes for incarceration but are "meted out in addition to, not in lieu of, incarceration."[340] It is rarely a one-to-one exchange between one day in prison and one day subjected to non-carceral punishment.[341]

More fundamentally, the fact that some non-carceral punishments are experienced as less harsh than prison does not justify punishments that violate constitutional rights. As Professor Michelle Alexander explains in the context of electronic monitoring, "digital prisons are to mass incarceration what Jim Crow was to slavery."[342] She elaborates that simply because an enslaved person was permitted to live with their family, albeit subject to "[W]hites only signs" and segregation, does not justify Jim Crow.[343] By the same token, simply because non-carceral punishment is less harsh than prison does not justify punishments that otherwise violate the Constitution.

### *C. Consent Nullifies Need for Constitutional Scrutiny*

An individual's purported consent to non-carceral punishments is often invoked as a primary objection to subjecting punishment to heightened constitutional scrutiny. Indeed, in my nationwide survey of rules governing court supervision, most required participants to either consent to, or waive, certain rights.[344] Because people choose non-carceral punishment over physical incarceration, the argument goes, there is no need for courts to resolve constitutional questions.

There are several reasons that consent does not resolve the question of punishment exemption. First, even if consent were not considered a basis to justify non-carceral punishments, the problem of constitutional limits remains. Imagine if consent was removed from the calculation. For example, if bargaining over punishment was impossible, it is likely that prosecutors would ask for, and judges would impose, non-carceral punishments that violate basic rights. Consent, in this scenario, is irrelevant. Indeed, in practice, courts often simply order many forms of non-carceral punishment, and there is no opportunity to "opt out."[345] In short, consent is an easy way for courts to avoid thorny constitutional questions, like the legality of punishment exemption. But the questions remain.

Interestingly, when the Supreme Court had the opportunity to adopt consent as the basis to uphold various rights deprivations associated with punishment, it

340. United States v. Reyes, 283 F.3d 446, 461 (2d Cir. 2002).
341. Weisburd, *Punitive Surveillance*, *supra* note 2, at 151; Murphy, *supra* note 181, at 1323.
342. Alexander, *supra* note 15.
343. *Id.*
344. Weisburd, *supra* note 53, at 11.
345. *See* Weisburd, *Sentenced to Surveillance*, *supra* note 74, at 741.

declined to do so.[346] Perhaps the Court's avoidance of invoking consent in some punishment-related cases is evidence that consent alone cannot—and should not—nullify the need for constitutional scrutiny.

Second, as previously noted, there is often no consent to non-carceral punishments. It is rarely as simple as someone consenting to a non-carceral option. More often, people spend months cycling through different types of punishment. There is no reason to consent to non-carceral punishments since they do not offer a "discount" on an otherwise carceral sentence and raise unconstitutional conditions problems, a topic I have addressed in related work.[347]

Third, the influence of coercion also makes consent an insufficient safeguard against the deprivation of rights.[348] As other scholars have observed, consent is a normative construction that often fails to account for race, gender, and disability as factors in determining if someone is free to leave, free to decline a search, or, in the context of non-carceral punishment, free to say no.[349] As Professors Roseanna Sommers and Vanessa K. Bohns's empirical research of consensual police encounters demonstrates, "decision makers judging the voluntariness of consent consistently underestimate the pressure to comply with intrusive requests."[350] Their research also suggests that the increasingly popular reform of informing people that they can refuse consent is likely to have little effect on the coercive nature of encounters between individuals and the state.[351] This research further proves what Professors I. Bennett Capers and Devon Carbado claim: people's decision to consent is based on the premise that the "good citizen, at times, willingly waives their right to silence, and at other times their right to speak. The good citizen, having nothing to hide, welcomes police surveillance."[352] These coercion concerns apply equally to consent in the punishment context and undermine the premise that consent is a sufficient check against otherwise unconstitutional punishments.

346. *See* United States v. Knights, 534 U.S. 112 (2001); Samson v. California, 547 U.S. 843 (2006). In both cases, the Court choose to not rely on consent to resolve the legality of the Fourth Amendment searches.

347. *See, e.g.*, Weisburd, *Sentenced to Surveillance*, *supra* note 74, at 743–44.

348. *Id.*; *see also* McLeod, *supra* note 15, at 1667. There is also a rich Law and Political Economy literature challenging consent and, in particular, the limits of consent in private law. *See, e.g.*, Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1813 (2020).

349. *See* Jamelia Morgan, *Disability's Fourth Amendment*, 122 COLUM. L. REV. 489, 495 (2022); Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 141 (2017).

350. Roseanna Sommers & Vanessa K. Bohns, *The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance*, 128 YALE L.J. 1962, 1962 (2019).

351. *Id.*

352. I. Bennett Capers, *Criminal Procedure and the Good Citizen*, 118 COLUM. L. REV. 653, 655 (2018); Carbado, *supra* note 349, at 135.

### *D. Erasure of Rights Is Not Punishment*

Another objection to subjecting punishment to traditional levels of constitutional scrutiny is that the deprivation of rights is not punishment. Rather, the objection goes, the erasure of rights is a *condition* of punishment and not the punishment itself.[353] A related objection is that there must be a distinction between punishment and, for example, court-ordered treatment or court-ordered job training. Job training and treatment are not, and should not, be considered "punishment."

This objection is not without support. Under traditional Eighth Amendment analysis, if the restrictions are not "formally meted out as *punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting [person] before it can qualify" as punishment.[354] Indeed, as Justice Thomas has opined, the restriction of rights associated with punishment should not in fact count as punishment itself.[355] The Eighth Amendment, Justice Thomas explained in a dissent, applies only to punishments meted out by statutes or sentencing judges and "not generally to any hardship that might befall a prisoner during incarceration."[356] As a lower court noted, conditions of probation are "not punitive in character and the question of whether or not the terms are cruel and unusual and thus violative of the Constitution . . . does not arise for the reason that the Constitution applies only to punishment."[357]

Yet rights restrictions that are often framed as merely conditions or rules are in fact "part of the punishment, even though not specifically 'meted out' by a statute or judge."[358] Justice Thomas himself later observed as much in the prison setting, observing in a footnote that "restrictions imposed by prison officials may also be a part of the sentence."[359]

In the context of non-carceral punishment, it is virtually impossible to separate conditions from punishment. They are one and the same. As the Seventh Circuit explained in the context of probation and parole, the conditions themselves "are the confinement," and challenging the conditions was the equivalent of attempting to remove bars from a cell.[360]

What are traditionally labeled as conditions or collateral consequences are often experienced as punishment. Some scholars have called for a broader definition of punishment, one that recognizes that conditions, as well as certain

353. Weisburd, *Punitive Surveillance*, *supra* note 2, at 185.

354. Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 CORNELL L. REV. 357, 380 (2018) (quoting Wilson v. Settler, 501 U.S. 294, 300 (1991)).

355. Hudson v. McMillian, 503 U.S. 1, 18 (1992) (Thomas, J., dissenting).

356. *Id.*

357. Springer v. United States, 148 F.2d 411, 415 (9th Cir. 1945).

358. Wilson v. Seiter, 501 U.S. 294, 306 (1991) (White, J., concurring) (original emphasis omitted).

359. Overton v. Bazzetta, 539 U.S. 126, 140 (2003) (Thomas, J., concurring).

360. Williams v. Wisconsin, 336 F.3d 576, 579 (7th Cir. 2003) (contemplating parole); *see also* Drollinger v. Milligan, 552 F.2d 1220, 1225 (7th Cir. 1977) (contemplating probation).

collateral consequences, are part of punishment if they are experienced as punishment.[361] As explored more fully in prior work, the factors set forth in *Kennedy v. Mendoza-Martinez*, which are relied on to determine if a measure is regulatory or punishment, weigh in favor of classifying non-carceral punishment as punishment.[362] Several courts have concluded that electronic ankle monitoring, for example, is punishment.[363] And should a person on probation or parole fail to attend court-ordered treatment or job training, they risk reincarceration—suggesting that these court-imposed requirements are in fact punishment.

The failure of courts to define punishment consistently or clearly is hardly new.[364] But even if rights-restricting punishments are classified as regulations, conditions, collateral consequences, or court-ordered treatment, that classification does not resolve the question of what constitutional security is due. The distinction makes a difference for Eighth Amendment purposes only. Conditions, rules, and regulations, like punishments or collateral consequences, have no special status that exempt them from traditional constitutional scrutiny.[365] State action is state action, regardless of the nature, title, or classification of the restraint or regulation. If a restraint is civil in nature, then it is more obvious that traditional constitution scrutiny applies. As this Article urges, the distinction between civil and criminal should make little difference when evaluating the legality of rights-violating restraints.

### *E. The Eighth Amendment Occupies the Field*

Challenging punishment exemption also raises questions about the proper role of the Eighth Amendment: should the Eight Amendment occupy the field, or do other constitutional limitations also apply? Skeptics might reasonably think that only the Eighth Amendment is the definitive and final word on limiting punishment. This view is most clearly captured in Justice Thomas's dissent in *Overton v. Bazzetta*, in which he posited that the Eighth Amendment is the only provision of the Constitution that "speaks to" punishment and, accordingly, states are "free to define and redefine all types of punishment, including

361. Ghali, *supra* note 229, at 636; Alice Ristroph, *Sexual Punishments*, 15 COLUM. J. GENDER & L. 139, 168 (2006); John F. Stinneford, *Is Solitary Confinement a Punishment?*, 115 NW. U. L. REV. 9, 18 (2020).

362. Weisburd, *Punitive Surveillance*, *supra* note 2, at 194.

363. *See* Riley v. N.J. Parole Bd., 98 A.3d 544, 560 (N.J. 2014); Commonwealth v. Cory, 911 N.E.2d 187, 196–97 (Mass. 2009); People v. Cole, 817 N.W.2d 497, 502 (Mich. 2012); Doe v. Rausch, 382 F. Supp. 3d 783, 799 (E.D. Tenn. 2019); People v. Hallak, 873 N.W.2d 811, 820–21 (Mich. Ct. App. 2015), *rev'd in part on other grounds*, 876 N.W.2d 523 (Mich. 2016).

364. *See* Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 781 (1997); Chin, *supra* note 245, at 1832; Jenny Roberts, Gundy *and the Civil-Criminal Divide*, 17 OHIO ST. J. CRIM. L. 207, 210 (2019); Joshua Kaiser, *We Know It When We See It: The Tenuous Line Between "Direct Punishment" and "Collateral Consequences*," 59 HOW. L.J. 341, 366 (2016).

365. *See* Mayson, *supra* note 254, at 306–09.

imprisonment, to encompass various types of deprivations—provided only that those deprivations are consistent with the Eighth Amendment."[366] Under this reasoning, so long as the rights restriction does not amount to cruel and unusual punishment, the restriction stands.

The position that punishment is only subject to Eighth Amendment scrutiny also reflects the Court's position in *Graham v. Connor* that constitutional claims must be "judged by reference to the specific constitutional standard which governs that right" rather than other related rights or a "more generalized notion of 'substantive due process.'"[367]

Yet, despite the *Graham* and *Overton* opinions, the Court has more recently "rejected the view that the applicability of one constitutional amendment pre-empts the guarantees of another."[368] Indeed, to the extent that punishments infringe on a range of rights, such as the First and Fourth Amendments or substantive due process, there is no obvious jurisprudential reason that *only* the Eighth Amendment applies.[369] Although the Supreme Court in *Graham* appeared to adopt the view that rights are "hermetically sealed units whose principles must not contaminate one another,"[370] this "constitutional rights segregation"[371] position is not inevitable.[372] Instead, amendments should be read together and understood as a whole.[373]

The view that the Eighth Amendment occupies the field also ignores the entire line of cases that do in fact apply other forms of constitutional scrutiny to punishment.[374] If the Eighth Amendment were the only limit on punishment, then presumably punishment today (both in prison and out) would be even harsher, so long as it did not run afoul of the cruel and unusual standard. But that is not the case. As addressed in Part II, courts routinely subject punishment to at least some level of scrutiny beyond the Eighth Amendment. Likewise, if the Eighth Amendment were the only limit on punishment, there would be no need for courts to rely on consent to justify rights-restricting punishments.

In short, the Eighth Amendment is not the only provision of the Constitution that limits punishment. As prior Supreme Court case law has made clear, a conviction and confinement in prison—without more—is not sufficient grounds to deprive people of all constitutional protections.[375] Of course, prison

366. 539 U.S. at 139–40 (Thomas, J., concurring) (original emphasis omitted).
367. 490 U.S. 386, 395 (1989).
368. United States v. James Daniel Good Real Prop., 510 U.S. 43, 49 (1993).
369. *See* Zuckerman, *supra* note 14, at 308.
370. Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163, 193 (2002).
371. I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1, 35 (2011).
372. Capers, *supra* note 352, at 709.
373. *Id.*; Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 805–10 (1994).
374. *See supra* Part II.E.
375. Bell v. Wolfish, 441 U.S. 520, 545 (1979).

involves obvious deprivations, including numerous liberty deprivations, but generally speaking, a person in prison "[r]etains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law."[376] If these are the protections afforded to people in prison, then people subject to non-carceral punishments should be no *worse* off when it comes to constitutional protections.

## IV.
## IMPLICATIONS OF ELIMINATING PUNISHMENT EXEMPTION

If non-carceral punishment is not immune from traditional constitutional scrutiny, what follows? What happens to non-carceral punishments like internet bans for people convicted of certain child pornography crimes? Or standard travel restrictions? Or court-mandated drug treatment or AA? Do these restrictions all disappear? This Section explores what it might mean for the future of non-carceral punishment, as well as punishment and the decarceration movement generally, if the erasure of rights associated with punishment were subject to the constitutional levels of scrutiny applied outside of the punishment context. Under this legal framework, some punishments would undoubtedly pass constitutional muster, but other restrictions would be narrowed, if not eliminated altogether.

### *A. New Limits on Non-Carceral Punishment*

Eliminating punishment exemption would mean that rights-stripping punishments would be subject to traditional constitutional scrutiny that applies outside the punishment context. The chart below offers a visual depiction of how rights-restricting punishments are evaluated now and how they could be evaluated were punishment exemption eliminated.

| **Type of Punishment** | **Existing Scrutiny** | **Applying Traditional Constitutional Scrutiny** |
|---|---|---|
| Electronic Monitoring | • Fourth Amendment search<br>• Not reasonably related to a purpose of punishment | • Fourth Amendment seizure<br>• First Amendment (freedom of association and speech)<br>• Substantive due process (autonomy and liberty) |
| Shaming Punishments | • Not reasonably related to a purpose of punishment<br>• Eighth Amendment | • First Amendment (compelled speech)<br>• Substantive due process (autonomy and liberty) |

376. Procunier v. Martinez, 416 U.S. 396, 422–23 (1974) (Marshall, J., concurring).

| | | |
|---|---|---|
| Family Restrictions | • Not reasonably related to a purpose of punishment<br>• Eighth Amendment | • First Amendment (freedom of association)<br>• Substantive due process (autonomy and liberty) |
| Apology Letters | • Not reasonably related to a purpose of punishment | • First Amendment (compelled speech)<br>• Substantive due process (autonomy)<br>• Fifth Amendment (right against self-incrimination) |

As this chart makes clear, the applicable constitutional scrutiny depends on the right involved. For example, punishments that restrict or compel speech would be subject to traditional First Amendment strict scrutiny analysis. While analyzing each type of non-carceral punishment using traditional constitutional scrutiny is beyond the scope of this Article, focusing on one example, electronic ankle monitoring, is instructive.

As noted previously, electronic ankle monitoring implicates several rights, including liberty interests, protected by the Fourteenth Amendment. What happens when electronic ankle monitoring (including its attendant rules) is subject to strict scrutiny? As deployed today, there are at least two features of electronic ankle monitoring that are neither narrowly tailored nor directly related to public safety or rehabilitation.

First, it is not evident that the degree of surveillance, control, and restrictions inherent in electronic ankle monitoring is necessary because there are less restrictive means of achieving the goals of court supervision. Generally, rehabilitation, public safety, and improved court appearance rates may be compelling government interests furthered by electronic ankle monitoring.[377] And yet, there is little empirical evidence that such monitoring promotes these interests.[378]

The question of efficacy was addressed in a dissent by the late Judge Keith of the Sixth Circuit, who expressed deep skepticism about ankle monitoring:

> Although the device is obvious, it cannot physically prevent an offender from re-offending. Granted, it may help law enforcement officers track

377. Eisenberg, *supra* note 76, at 137.

378. Commonwealth v. Norman, 142 N.E.3d 1, 9 (Mass. 2020) ("There is no indication on this record that GPS monitoring would have increased the likelihood of the defendant returning to court."); *see also* Eisenberg, *supra* note 76, at 136–45 (describing how electronic monitoring does not necessarily further traditional theories of punishment); Christine S. Scott-Hayward & Erin Eife, *Correctional and Sentencing Law Commentary: Electronic Monitoring*, 57 CRIM. L. BULL. art. 5 (2021) (noting that "there is little evidence showing the effectiveness" of electronic monitoring); KATHRYN SALTMARSH, ILL. SENT'G POL'Y ADVISORY COMM., RESEARCH BRIEFING: STATE USE OF ELECTRONIC MONITORING 6 (2018) (concluding that monitoring has little effect on recidivism); JAMES ET AL., *supra* note 76 (addressing how the harms of monitoring undermine the goals of monitoring, including reducing risk to safety and missed court dates).

> the offender (after the crime has already been committed), but it does not serve the intended purpose of public safety because neither the device, nor the monitoring, serve as actual preventative measures. Likewise, it is puzzling how the regulatory means of requiring the wearing of this plainly visible device fosters rehabilitation. To the contrary . . . a public sighting of the modern day "scarlet letter"—the relatively large G.P.S. device—will undoubtedly cause panic, assaults, harassment, and humiliation.[379]

Following this logic, electronic monitoring rules that restrict people's ability to visit religious institutions, hospitals, or other places where the risk of re-offending is arguably low are neither necessary nor narrowly focused. Similarly, there is scant evidence that house arrest and restrictions on social visits have a direct impact on recidivism.[380] As Maya Schenwar and Victoria Law explain, electronic surveillance mechanisms are not "rehabilitative or transformative—they do not support people in making changes that would be helpful in their lives."[381] According to a National Institute of Justice report, people on ankle monitors believed that the visibility of the monitor made it *more* difficult to obtain and keep a job.[382] Without steady employment, it becomes impossible to cover court and monitoring fees, and reincarceration becomes more likely.[383]

If there is little evidence that electronic monitoring in fact accomplishes the goal of rehabilitation, ensures court appearances, or protects public safety, it is difficult to justify the restraint as necessary. In fact, the opposite may be true. Research consistently shows the dangers of isolation and the positive impact of social and familial relationships for people returning from prison.[384] There is also evidence that intensive supervision increases the odds that a person will be rearrested and reincarcerated.[385] It is therefore not surprising that probation and

379. Doe v. Bredesen, 507 F.3d 998, 1012 (6th Cir. 2007) (Keith, J., dissenting).

380. Eisenberg, *supra* note 76, at 144.

381. SCHENWAR & LAW, *supra* note 15, at 35.

382. NAT'L INST. OF JUST., U.S. DEP'T OF JUST., ELECTRONIC MONITORING REDUCES RECIDIVISM 3 (2011).

383. SCHENWAR & LAW, *supra* note 15, at 37–41.

384. *See* HARV. KENNEDY SCH. & EXEC. SESSION ON CMTY. CORR., TOWARD AN APPROACH TO COMMUNITY CORRECTIONS FOR THE 21ST CENTURY: CONSENSUS DOCUMENT OF THE EXECUTIVE SESSION ON COMMUNITY CORRECTIONS (2017) (showing "family members should be viewed as critical partners in the process of social integration"); AMY L. SOLOMON, JENNY W. L. OSBORNE, LAURA WINTERFIELD, BRIAN ELDERBROOM, PEGGY BURKE, RICHARD STROKER, EDWARD E. RHINE & WILLIAM D. BURRELL, URB. INST., PUTTING PUBLIC SAFETY FIRST: 13 PAROLE SUPERVISION STRATEGIES TO ENHANCE REENTRY OUTCOMES 18–19 (2008) ("[I]nterventions shown to be successful with at-risk populations are those that recruit and engage family members, spouses, and other supportive individuals involved in the lives of the intervention population."); STEVE AOS, MAMA MILLER & ELIZABETH DRAKE, EVIDENCE-BASED ADULT CORRECTIONS PROGRAMS: WHAT WORKS AND WHAT DOES NOT 5–6 (2006).

385. Michelle S. Phelps, *Mass Probation from Micro to Macro: Tracing the Expansion and Consequences of Community Supervision*, 3 ANN. REV. CRIMINOLOGY 261, 262 (2020); MICHAEL P. JACOBSON, VINCENT SCHIRALDI, REAGAN DALY & EMILY HOTEZ, HARV. KENNEDY SCH. & EXEC.

parole violations, which include violations related to electronic monitoring, are significant contributors to mass incarceration.[386]

Second, *who* is subject to electronic monitoring is also not narrowly tailored. For electronic monitoring to be limited and necessary, it would only be imposed in cases where a person would be incarcerated in the absence of monitoring. This requirement would ensure that the monitoring was genuinely being used as an alternative and not simply as an add-on. This is a difficult inquiry. As other scholars have pointed out, risk assessment algorithms that are used at both the pretrial and sentencing stages to determine who should be released are rife with problems and bias, often relying on data that is itself suspect.[387] But the difficulty in answering this question should not stop the inquiry. Given the deplorable conditions in prisons and jails, electronic monitoring may be a better alternative in some circumstances, but those circumstances should be much more limited than they are today.

In some circumstances, electronic monitoring may survive strict scrutiny. If it was "imposed for only a short period, was demonstrably effective, and constituted the only means of achieving the safety goal, for instance, it might nonetheless withstand challenge."[388] Surviving strict scrutiny in this circumstance makes intuitive sense. Traditional constitutional scrutiny does not operate in a vacuum, and the definition of a compelling state interest inevitably accounts for the specific needs and contexts of the institutional setting.

While applying heightened scrutiny to different types of non-carceral punishment is beyond the scope of this Article, the claim remains regardless of the right involved: while some subset of non-carceral punishments may survive traditional constitutional scrutiny, many forms and features of non-carceral punishment would be reined in, if not eliminated altogether.

### *B. New Limits on All Punishment*

The problem of exempting punishment from traditional constitutional review is not limited to non-carceral punishment. If punishment exemption is rejected, then what about prison? Or the death penalty? Are those punishments also subject to the Bill of Rights? The answer must be yes, despite the practical implications. A prison sentence is a seizure. Presumably courts would uphold

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SESSION ON CMTY. CORR., LESS IS MORE: HOW REDUCING PROBATION POPULATIONS CAN IMPROVE OUTCOMES 6 (2017).

386. *See* KENDRA BRADNER, VINCENT SCHIRALDI, NATASHA MEDIA & EVANGELINE LOPOO, MORE WORK TO DO: ANALYSIS OF *PROBATION AND PAROLE IN THE UNITED STATES, 2017–18* 1 (2020); SCHENWAR & LAW, *supra* note 15, at 88; HUM. RTS. WATCH & AM. C.L. UNION, REVOKED: HOW PROBATION AND PAROLE FEED MASS INCARCERATION IN THE UNITED STATES 5–6 (2020).

387. *See* Ngozi Okidegbe, *Discredited Data*, 107 CORNELL L. REV. 2007, 2032–46 (2022); Jessica Eaglin, *Racializing Algorithms*, 111 CALIF. L. REV. 753, 756 (2023); Sean Allan Hill II, *Bail Reform and the (False) Racial Promise of Algorithmic Risk Assessment*, 68 UCLA L. REV. 910, 914–16 (2022); Sandra G. Mayson, *Bias in, Bias out*, 128 YALE L.J. 2218, 2221–24 (2019).

388. Murphy, *supra* note 181, at 1406.

such seizures as reasonable, but not because the Fourth Amendment is inapplicable. Likewise, incarceration as an infringement on liberty would be subject to strict scrutiny.[389] And were a court to punish someone in prison by requiring that they never speak or write critically about the government, that punishment would need to withstand First Amendment scrutiny. As Professors Kaufman and Driver argue in the context of prison law, "courts are perfectly capable of refined, rights-specific jurisprudence, even when dealing with constitutional criminal procedure and exceptional institutions" such as prisons, or, for that matter, punishment more generally.[390]

Applying traditional constitutional scrutiny to rights-stripping punishments is not without precedent. The Religious Land Use and Institutionalized Persons Act (RLUIPA), passed in 2001, aimed to protect religious practices in prisons. In passing the Act, Congress explicitly imposed a strict scrutiny standard: pursuant to the Act, prisons cannot substantially burden a prisoner's religious exercise unless the burden is "in furtherance of a compelling governmental interest" and is "the least restrictive means of furthering that compelling governmental interest."[391] The Act "creates a bifurcated regime for expressive activity in prison, in which speech claims are governed by a highly deferential standard while free exercise claims are reviewed under strict scrutiny."[392] Indeed, when the Supreme Court relied on RLUIPA to strike down a prison policy that prevented a Muslim prisoner from growing a beard, the Court emphasized the need to apply RLUIPA's "rigorous standard" and not simply defer to the expertise of prison officials.[393]

Perhaps most notable for purposes of this Article are the repercussions of RLUIPA. While the Act's impact should not be overstated, it has unquestionably helped protect the religious rights of people in prison without jeopardizing prison security, which, as noted previously, is the cited justification for upholding rights restrictions in prison.[394] In short, RLUIPA offers a helpful "real-world test of the likely effects of more rigorous review" of right restrictions as punishment and, thus far, it has succeeded.[395] People in prison often prevail on RLUIPA claims while losing the same claims brought as violations of the Free Exercise Clause.[396]

Despite the success of RLUIPA in the context of the First Amendment, the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*

389. *See* Dudani, *supra* note 12, at 2123.

390. Driver & Kaufman, *supra* note 12, at 575.

391. 42 U.S.C. § 2000cc(a)(1)(A), (B) (2000).

392. Shapiro, *supra* note 195, at 978.

393. Holt v. Hobbs, 574 U.S. 352, 364 (2015).

394. Gary R. Rom, *RLUIPA and Prisoner's Rights: Vindicating Liberty of Conscience for the Condemned by Targeting a State's Bottom Line*, 44 VAL. U. L. REV. 283 (2009).

395. Shapiro, *supra* note 195, at 1023.

396. *Id.*; *see also* Davila v. Gladden, 777 F.3d 1198, 1212, 1214 (11th Cir. 2015); Lovelace v. Lee, 472 F.3d 174, 188 n.3 (4th Cir. 2006); Murphy v. Mo. Dep't of Corr., 372 F.3d 979, 983–84, 988–89 (8th Cir. 2004); Kikumura v. Hurley, 242 F.3d 950, 956–62 (10th Cir. 2001).

suggests a more uncertain future for substantive due process challenges to non-carceral punishment.[397] Moreover, regardless of the right involved, it is not immediately obvious that subjecting all forms of rights-restricting punishments to great constitutional scrutiny would result in less restrictive punishments or address the deeper racial and economic inequities endemic to the legal system. Indeed, rights-based frameworks are sometimes of limited use and are rarely vindicative for already marginalized groups.[398]

The viability of successful constitutional challenges to punishment surfaces critical questions about the efficacy of purely legal interventions. On one hand, there is a legitimate concern that heighted scrutiny and greater emphasis on rights will result in doubling down on the current legal regime and will spur the "pacification effect" of reform, namely convincing people there is progress when there is none.[399] There is also no guarantee that applying traditional constitutional scrutiny will better protect rights than, for example, the *Turner* standard or rational basis review. This is partially why progressive scholars question whether a "rights-based framework" effectively protects the rights of marginalized individuals.[400] As Derecka Purnell explains, prison abolitionists "don't need lawyers who will seek to uphold the constitution, because most of the violence of prisons is constitutional; instead, we need lawyers who will betray the power of the constitution."[401] The Constitution, according to this view, offers little solace for historically oppressed people and instead is more often a tool of racial, economic, and social subordination.[402] Indeed, the argument to reject punishment exemption implicitly accepts the legitimacy of some punishment—if limited—and the continued existence of the criminal legal system.[403]

On the other hand, deploying reimagined constitutional arguments to challenge the rights restrictions associated with punishment may be an example

397. 142 S. Ct. 2228 (2022) (overturning *Roe v. Wade* as unsupported by substantive due process under the Due Process Clause of the Fourteenth Amendment).

398. Paul D. Butler, *Poor People Lose:* Gideon *and the Critique of Rights*, 122 YALE L.J. 2176, 2196–97 (2013); Weisburd, *supra* note 192, at 48.

399. Butler, *supra* note 32, at 1467.

400. Roberts, *supra* note 231, at 107; *see also* sources cited *supra* note 32; Dolovich, *supra* note 293, at 303 (2022) (observing that "prison law's moral center of gravity" tilts so far in the direction of the government that constitutional claims only win "in the most extreme cases, leaving the prison environment largely free of judicial regulation").

401. Micah Hershkind, *Some Reflections on Prison Abolition*, MEDIUM (Dec. 7, 2019), https://micahherskind.medium.com/some-reflections-on-prison-abolition-after-mumi-5197a4c3cf98 [https://perma.cc/4LFF-4QJF] (emphasis omitted) (quoting Derecka Purnell).

402. Roberts, *supra* note 231, at 106; Butler, *supra* note 398, at 2196; Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1790 n.22 (2020).

403. S*ee* Levin, *supra* note 12, at 1427 (suggesting that "seeing the *carceral* state as uniquely troubling would and should require an account or theory of the *non-carceral* state"); Ristroph, *The Wages of Criminal Law Exceptionalism*, *supra* note 12, at 3 (cautioning that a focus on "exceptionalism" then "makes it difficult or impossible to contemplate a world without criminal law").

of what Professor Dorothy Roberts calls "abolition constitutionalism."[404] Professor Roberts suggests that "prison abolitionism can craft an approach to engaging with the Constitution that furthers radical change" by using the Constitution to expose hypocrisy, while recognizing that the existing legal system will not bring about freedom for the people historically subordinated by the criminal legal system.[405] Under this approach, advocates might challenge punishment exemption or expose its hypocrisy to further the goal of abolition, which is to shrink and ultimately eliminate the carceral state.[406] Even if these arguments have limited purchase with the post-*Dobbs* Supreme Court, there may be greater success with advocacy efforts aimed at state courts, state legislatures, and agencies amenable to policy changes that limit (or eliminate) the rights-restricting nature of non-carceral punishments.

The Reconstruction Amendments, in particular, can be deployed in the project to challenge rights-restricting punishments. These amendments were "inspired by antislavery beliefs" and were "designed to extend to all people the right to have autonomous life choices of the kind that slavery had so cruelly restricted."[407] As W.E.B. Du Bois explained, "[t]he abolition of slavery meant not simply abolition of legal ownership of the slave; it meant the uplift of slaves and their eventual incorporation into the body civil, politic, and social, of the United States."[408] Although the Punishment Clause of the Thirteenth Amendment "allows for the imposition of compelled labor as punishment for a crime, it still does not permit the badges and incidents of slavery,"[409] which rights-restricting punishments are. The goal of the amendments, as Professor Peggy Cooper Davis explains, "was not just to reunite the states, but to recreate the polity so that citizenship would, first, be universal, and second, encompass the liberties that slavery had denied."[410] This understanding of the Reconstruction Amendments is consistent with the reasons to reject punishment exemption, discussed *supra* in Part II.

Admittedly, while applying traditional constitutional scrutiny to punishment may find jurisprudential support in the Reconstruction Amendments, and RLUIPA provides an instructive case study, there are additional reasons to be skeptical of legal or legislative solutions. Progressive judges are often the most powerful and vocal proponents of alternatives to incarceration and may be less receptive to challenges. Likewise, legislative responses to the rights-stripping nature of non-carceral punishments may be

404. Roberts, *supra* note 231, at 112.
405. *Id.* at 108.
406. *Id.* at 109; *see also* Hasbrouck, *supra* note 237, at 129.
407. Davis, *supra* note 238.
408. W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 189 (Russell & Russell 1956) (1935).
409. Hasbrouck, *supra* note 237, at 145.
410. Peggy Cooper Davis, *Neglected Stories and Civic Space*, 7 WASH. & LEE RACE & ETHNIC ANC. L.J. 45, 48 (2001).

equally unrealistic because prison-alternative programs are often viewed as, and sometimes are, politically viable solutions to mass incarceration.[411] Part of the challenge is that many of the alternatives to incarceration were conceived of by police, prosecutors, and courts—all institutional actors reluctant to give up power.[412] Ways of addressing punishment exemption that do not depend on legal or legislative interventions is the topic I turn to next.

### *C. New Lessons for Decarceration*

Given growing bipartisan interest in alternatives to incarceration and the perceived benevolence of non-carceral punishments, it is imperative to reckon with the unconstitutionality of rights-stripping punishments. Rejecting punishment exemption has both normative and pragmatic implications for decarceration efforts.

Normatively, the concept of decarceration has been, at least to some degree, coopted to include a range of rights-restricting punishments imposed in the name of decarceration.[413] As my empirical research demonstrates, however, these rights-restricting punishments run counter to the original goals of the decarceration movement, which were defined as the "cutting of ties to the criminal (in)justice systems, including parole and probation, [and] utilizing the services of community groups on a contractual basis."[414] Although non-carceral punishments are often heralded as bipartisan decarceration efforts, the rights-stripping nature of these punishments in fact undermine truly progressive, decarcerative goals.[415]

In at least some respects, exposing the illegality of non-carceral punishments offers purchase, albeit modest, for reformers and abolitionists committed to "[g]radually reducing sanctions even while advocating their abolition," which "is not contradictory if we continue to reduce until they are

411. *See generally* RACHEL BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION (2019) (detailing and analyzing the political obstacles to criminal justice reform); SCHENWAR & LAW, *supra* note 15, at 17.

412. *See, e.g.*, Cynthia Godsoe, *The Place of the Prosecutor in Abolitionist Praxis*, 69 UCLA L. REV. 164, 213 (2022) (arguing that progressive prosecutors cannot reform the legal system from the inside).

413. *See* Arnett, *supra* note 15, at 663; SCHENWAR & LAW, *supra* note 15, at 57; McLeod, *supra* note 15, at 1671 (arguing that criminal justice surveillance mechanisms, specifically via electronic ankle monitors, perpetuate social harm despite claims that they are more moderate forms of punishment).

414. FAY HONEY KNOPP, BARBARA BOWARD, MARY JO BRACH, SCOTT CHRISTIANSON, MARY ANN LARGEN, JULIE LEWIN, JANET LUGO, MARK MORRIS & WENDY NEWTON, INSTEAD OF PRISONS: A HANDBOOK FOR ABOLITIONISTS ch. 5 (1976), https://www.prisonpolicy.org/scans/instead_of_prisons/chapter5.shtml [https://perma.cc/P92K-U84C].

415. *See* Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 268–69 (2018) (arguing that part of the reason critics cannot achieve criminal justice reform is because they are talking about two fundamentally different problems, i.e., mass incarceration versus overcriminalization); *see also* Allegra M. McLeod*, Beyond the Carceral State*, 95 TEX. L. REV. 651, 666 (2017) (reviewing MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS (2015)).

eliminated."[416] There is also value in challenging the premise that some people are protected by the Constitution and others, in particular poor people and people of color convicted of crimes, are excluded.[417]

Challenging rights-violating punishments should also force a recalibration of what is considered the appropriate baseline for evaluating punishment that occurs outside of prison. Non-carceral punishment is most often compared to prison—and the extent to which non-carceral alternatives are less harsh than prison. But perhaps that is the incorrect baseline. When contemplating alternatives to incarceration, the baseline should be freedom from all forms of carceral control and surveillance.[418] The ideal presumption should be that if someone is not in prison, they should be free.[419]

Pragmatically, decoupling decarceration from state-imposed non-carceral punishment could mean that we rely instead on social structures of support and community self-care models, all of which are separate from criminal law institutions.[420] As Professors Monica Bell, Katherine Beckett, and Forrest Stuart explain, rather than social services embedded within the criminal justice system, sources of support may come from investments in social welfare, safety production within communities and neighborhoods, and racial reparations.[421]

To be sure, there is reason to be skeptical that "criminal law and its pathologies [are] clearly distinguishable from any imagined alternative."[422] Scholars have cautioned that carceral logic and punitiveness are embedded in many systems that operate adjacent to, but outside, the criminal system (such as housing courts, schools, family law, welfare responses, and others).[423] Within the criminal legal system, Professor Jessica Eaglin examines three examples of "neorehabilitation" efforts—drug courts, parole revocation reform, and early release reform—to make the case that these reforms are simply a rhetorical shift that keep in place an incapacitation regime.[424] The reality that carceral logic

416. KNOPP ET AL., *supra* note 414.

417. *See* Fanna Gamal, *The Racial Politics of Protection: A Critical Race Examination of Police Militarization*, 104 CALIF. L. REV. 979, 1006 (2016); Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2057 (2017).

418. There is a related and important question about whether punishment can ever be consistent with freedom and when, if ever, violence should be used to express moral judgements. I do not purport to resolve these questions, only to highlight their existence. Alice Ristroph's work thoroughly and thoughtfully explores these important questions. *See* Alice Ristroph, *When Freedom Isn't Free*, 14 NEW CRIM. L. REV. 468, 478 (2011); Ristroph*, The Wages of Criminal Law Exceptionalism*, *supra* note 12, at 8.

419. SCHENWAR & LAW, *supra* note 15, at 23.

420. McLeod, *supra* note 33, at 1163, 1228.

421. Monica C. Bell, Katherine Beckett & Forrest Stuart, *Investing in Alternatives: Three Logics of Criminal System Replacement*, 11 U.C. IRVINE L. REV. 1291, 1294 (2021).

422. Levin, *supra* note 12, at 1385; *see also* Bell et al., *supra* note 421, at 1296.

423. *Id.*; *see, e.g.*, SCHENWAR & LAW, *supra* note 15, at 5; DOROTHY ROBERTS, TORN APART 192 (2022); Murray, *supra* note 155, at 6–8; S. Lisa Washington, *Survived & Coerced: Epistemic Injustice in the Family Regulation System*, 122 COLUM. L. REV. 1097, 1102–03 (2022); Nicole Summers, *Civil Probation*, 75 STAN. L. REV. 847, 847–48 (2023).

424. Eaglin, *supra* note 15, at 222.

extends well beyond prison walls is all the more reason to treat all state action the same for purposes of constitutional rights. All state action, such as punishment, civil sanctions, welfare policies, or regulations, should be subject to the same level of constitutional scrutiny.

Thanks to the work of grassroots movements and community organizers and activists, examples of decarceration decoupled from the state abound. In Northern California, Silicon Valley Debug, a non-profit run by and for people impacted by the criminal legal system, began the Community Release Project.[425] The project drives people to and from court dates, helps people navigate access to social services, and provides reentry support.[426] As Silicon Valley Debug's Founder Raj Jayadev explains, to "tap into this natural set of community resources can be the way out of the false dichotomy of incarceration or supervision."[427] The New Way of Life Reentry Project in Los Angeles provides another example. That program is not funded or run by the government and provides "housing, case management, pro bono legal services, advocacy, and leadership development for people rebuilding their lives after incarceration."[428]

## CONCLUSION

As the nation grapples with defining the "new normal" after the COVID-19 pandemic, a similar question persists in the criminal legal system: what is the "new normal" punishment after a wave of new non-carceral punishments has replaced prison? As this Article suggests, the new normal is *not* brick-and-mortar prisons as the archetypal form of incarceration and punishment. While mass incarceration shows no sign of abating, new forms of non-carceral punishment are proliferating. Today, people in the criminal legal system experience an ever-growing web of carceral and non-carceral punishments, all of which entail the deprivation of fundamental rights that would be unconstitutional if imposed outside the punishment context. And yet, these non-carceral punishments continue to escape traditional constitutional scrutiny. As a result, the disenfranchisement of people convicted of crimes persists and further entrenches the economic, gender, and racial inequity that has long been part of the fabric of the criminal legal system.

But the new normal need not—and should not—include exempting punishment from traditional constitutional review. Punishment that infringes on constitutional rights should be viewed for what it is: state action subject to the corresponding constitutional review applicable outside of the punishment

425. Raj Jayadev, *Decarceration Doesn't Have to Mean Supervision Expansion—The Santa Clara County Story*, SV DE-BUG (Sept. 16, 2021), https://www.siliconvalleydebug.org/stories/decarceration-doesn-t-have-to-mean-supervision-expansion-the-santa-clara-county-story [https://perma.cc/SHR7-WHCP].

426. *Id.*

427. *Id.*

428. *About Us*, A NEW WAY OF LIFE, https://anewwayoflife.org/ [https://perma.cc/HH9B-P9KT].

context. As we reckon with the future of the carceral state, including the potential for true decarceration, the illegality and illegitimacy of rights-violating punishments cannot be ignored.

# COHEN v. CALIFORNIA

APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

No. 299. Argued February 22, 1971—Decided June 7, 1971

Appellant was convicted of violating that part of Cal. Penal Code § 415 which prohibits "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by . . . offensive conduct," for wearing a jacket bearing the words "Fuck the Draft" in a corridor of the Los Angeles Courthouse. The Court of Appeal held that "offensive conduct" means "behavior which has a tendency to provoke *others* to acts of violence or to in turn disturb the peace," and affirmed the conviction. *Held:* Absent a more particularized and compelling reason for its actions, the State may not, consistently with the First and Fourteenth Amendments, make the simple public display of this single four-letter expletive a criminal offense. Pp. 22–26.

1 Cal. App. 3d 94, 81 Cal. Rptr. 503, reversed.

HARLAN, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, STEWART, and MARSHALL, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BURGER, C. J., and BLACK, J., joined, and in which WHITE, J., joined in part, *post,* p. 27.

*Melville B. Nimmer* argued the cause for appellant. With him on the brief was *Laurence R. Sperber.*

*Michael T. Sauer* argued the cause for appellee. With him on the brief was *Roger Arnebergh.*

*Anthony G. Amsterdam* filed a brief for the American Civil Liberties Union of Northern California as *amicus curiae* urging reversal.

MR. JUSTICE HARLAN delivered the opinion of the Court.

This case may seem at first blush too inconsequential to find its way into our books, but the issue it presents is of no small constitutional significance.

Appellant Paul Robert Cohen was convicted in the Los Angeles Municipal Court of violating that part of California Penal Code § 415 which prohibits "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by . . . offensive conduct . . . ." [1] He was given 30 days' imprisonment. The facts upon which his conviction rests are detailed in the opinion of the Court of Appeal of California, Second Appellate District, as follows:

> "On April 26, 1968, the defendant was observed in the Los Angeles County Courthouse in the corridor outside of division 20 of the municipal court wearing a jacket bearing the words 'Fuck the Draft' which were plainly visible. There were women and children present in the corridor. The defendant was arrested. The defendant testified that he wore the jacket knowing that the words were on the jacket as a means of informing the public of the depth of his feelings against the Vietnam War and the draft.
>
> "The defendant did not engage in, nor threaten to engage in, nor did anyone as the result of his conduct

[1] The statute provides in full:

"Every person who maliciously and willfully disturbs the peace or quiet of any neighborhood or person, by loud or unusual noise, or by tumultuous or offensive conduct, or threatening, traducing, quarreling, challenging to fight, or fighting, or who, on the public streets of any unincorporated town, or upon the public highways in such unincorporated town, run any horse race, either for a wager or for amusement, or fire any gun or pistol in such unincorporated town, or use any vulgar, profane, or indecent language within the presence or hearing of women or children, in a loud and boisterous manner, is guilty of a misdemeanor, and upon conviction by any Court of competent jurisdiction shall be punished by fine not exceeding two hundred dollars, or by imprisonment in the County Jail for not more than ninety days, or by both fine and imprisonment, or either, at the discretion of the Court."

in fact commit or threaten to commit any act of violence. The defendant did not make any loud or unusual noise, nor was there any evidence that he uttered any sound prior to his arrest." 1 Cal. App. 3d 94, 97–98, 81 Cal. Rptr. 503, 505 (1969).

In affirming the conviction the Court of Appeal held that "offensive conduct" means "behavior which has a tendency to provoke *others* to acts of violence or to in turn disturb the peace," and that the State had proved this element because, on the facts of this case, "[i]t was certainly reasonably foreseeable that such conduct might cause others to rise up to commit a violent act against the person of the defendant or attempt to forceably remove his jacket." 1 Cal. App. 3d, at 99–100, 81 Cal. Rptr., at 506. The California Supreme Court declined review by a divided vote.[2] We brought the case here, postponing the consideration of the question of our jurisdiction over this appeal to a hearing of the case on the merits. 399 U. S. 904. We now reverse.

The question of our jurisdiction need not detain us long. Throughout the proceedings below, Cohen con-

[2] The suggestion has been made that, in light of the supervening opinion of the California Supreme Court in *In re Bushman,* 1 Cal. 3d 767, 463 P. 2d 727 (1970), it is "not at all certain that the California Court of Appeal's construction of § 415 is now the authoritative California construction." *Post,* at 27 (BLACKMUN, J., dissenting). In the course of the *Bushman* opinion, Chief Justice Traynor stated:

"[One] may . . . be guilty of disturbing the peace through 'offensive' conduct [within the meaning of § 415] if by his actions he wilfully and maliciously incites others to violence or engages in conduct likely to incite others to violence. (*People* v. *Cohen* (1969) 1 Cal. App. 3d 94, 101, [81 Cal. Rptr. 503].)" 1 Cal. 3d, at 773, 463 P. 2d, at 730.

We perceive no difference of substance between the *Bushman* construction and that of the Court of Appeal, particularly in light of the *Bushman* court's approving citation of *Cohen.*

sistently claimed that, as construed to apply to the facts of this case, the statute infringed his rights to freedom of expression guaranteed by the First and Fourteenth Amendments of the Federal Constitution. That contention has been rejected by the highest California state court in which review could be had. Accordingly, we are fully satisfied that Cohen has properly invoked our jurisdiction by this appeal. 28 U. S. C. § 1257 (2); *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282 (1921).

I

In order to lay hands on the precise issue which this case involves, it is useful first to canvass various matters which this record does *not* present.

The conviction quite clearly rests upon the asserted offensiveness of the *words* Cohen used to convey his message to the public. The only "conduct" which the State sought to punish is the fact of communication. Thus, we deal here with a conviction resting solely upon "speech," cf. *Stromberg* v. *California,* 283 U. S. 359 (1931), not upon any separately identifiable conduct which allegedly was intended by Cohen to be perceived by others as expressive of particular views but which, on its face, does not necessarily convey any message and hence arguably could be regulated without effectively repressing Cohen's ability to express himself. Cf. *United States* v. *O'Brien,* 391 U. S. 367 (1968). Further, the State certainly lacks power to punish Cohen for the underlying content of the message the inscription conveyed. At least so long as there is no showing of an intent to incite disobedience to or disruption of the draft, Cohen could not, consistently with the First and Fourteenth Amendments, be punished for asserting the evident position on the inutility or immorality of the draft his jacket reflected. *Yates* v. *United States,* 354 U. S. 298 (1957).

Appellant's conviction, then, rests squarely upon his exercise of the "freedom of speech" protected from arbitrary governmental interference by the Constitution and can be justified, if at all, only as a valid regulation of the manner in which he exercised that freedom, not as a permissible prohibition on the substantive message it conveys. This does not end the inquiry, of course, for the First and Fourteenth Amendments have never been thought to give absolute protection to every individual to speak whenever or wherever he pleases, or to use any form of address in any circumstances that he chooses. In this vein, too, however, we think it important to note that several issues typically associated with such problems are not presented here.

In the first place, Cohen was tried under a statute applicable throughout the entire State. Any attempt to support this conviction on the ground that the statute seeks to preserve an appropriately decorous atmosphere in the courthouse where Cohen was arrested must fail in the absence of any language in the statute that would have put appellant on notice that certain kinds of otherwise permissible speech or conduct would nevertheless, under California law, not be tolerated in certain places. See *Edwards* v. *South Carolina*, 372 U. S. 229, 236–237, and n. 11 (1963). Cf. *Adderley* v. *Florida*, 385 U. S. 39 (1966). No fair reading of the phrase "offensive conduct" can be said sufficiently to inform the ordinary person that distinctions between certain locations are thereby created.[3]

In the second place, as it comes to us, this case cannot be said to fall within those relatively few categories of

[3] It is illuminating to note what transpired when Cohen entered a courtroom in the building. He removed his jacket and stood with it folded over his arm. Meanwhile, a policeman sent the presiding judge a note suggesting that Cohen be held in contempt of court. The judge declined to do so and Cohen was arrested by the officer only after he emerged from the courtroom. App. 18–19.

instances where prior decisions have established the power of government to deal more comprehensively with certain forms of individual expression simply upon a showing that such a form was employed. This is not, for example, an obscenity case. Whatever else may be necessary to give rise to the States' broader power to prohibit obscene expression, such expression must be, in some significant way, erotic. *Roth* v. *United States,* 354 U. S. 476 (1957). It cannot plausibly be maintained that this vulgar allusion to the Selective Service System would conjure up such psychic stimulation in anyone likely to be confronted with Cohen's crudely defaced jacket.

This Court has also held that the States are free to ban the simple use, without a demonstration of additional justifying circumstances, of so-called "fighting words," those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction. *Chaplinsky* v. *New Hampshire,* 315 U. S. 568 (1942). While the four-letter word displayed by Cohen in relation to the draft is not uncommonly employed in a personally provocative fashion, in this instance it was clearly not "directed to the person of the hearer." *Cantwell* v. *Connecticut,* 310 U. S. 296, 309 (1940). No individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult. Nor do we have here an instance of the exercise of the State's police power to prevent a speaker from intentionally provoking a given group to hostile reaction. Cf. *Feiner* v. *New York,* 340 U. S. 315 (1951); *Terminiello* v. *Chicago,* 337 U. S. 1 (1949). There is, as noted above, no showing that anyone who saw Cohen was in fact violently aroused or that appellant intended such a result.

Finally, in arguments before this Court much has been made of the claim that Cohen's distasteful mode of expression was thrust upon unwilling or unsuspecting viewers, and that the State might therefore legitimately act as it did in order to protect the sensitive from otherwise unavoidable exposure to appellant's crude form of protest. Of course, the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense. See, *e. g., Organization for a Better Austin* v. *Keefe,* 402 U. S. 415 (1971). While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue, *e. g., Rowan* v. *Post Office Dept.,* 397 U. S. 728 (1970), we have at the same time consistently stressed that "we are often 'captives' outside the sanctuary of the home and subject to objectionable speech." *Id.,* at 738. The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.

In this regard, persons confronted with Cohen's jacket were in a quite different posture than, say, those subjected to the raucous emissions of sound trucks blaring outside their residences. Those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes. And, while it may be that one has a more substantial claim to a recognizable privacy interest when walking through a courthouse corridor than, for example, strolling through Central Park, surely it is nothing like the interest in

being free from unwanted expression in the confines of one's own home. Cf. *Keefe, supra.* Given the subtlety and complexity of the factors involved, if Cohen's "speech" was otherwise entitled to constitutional protection, we do not think the fact that some unwilling "listeners" in a public building may have been briefly exposed to it can serve to justify this breach of the peace conviction where, as here, there was no evidence that persons powerless to avoid appellant's conduct did in fact object to it, and where that portion of the statute upon which Cohen's conviction rests evinces no concern, either on its face or as construed by the California courts, with the special plight of the captive auditor, but, instead, indiscriminately sweeps within its prohibitions all "offensive conduct" that disturbs "any neighborhood or person." Cf. *Edwards* v. *South Carolina, supra.*[4]

## II

Against this background, the issue flushed by this case stands out in bold relief. It is whether California can excise, as "offensive conduct," one particular scurrilous epithet from the public discourse, either upon the theory of the court below that its use is inherently likely to cause violent reaction or upon a more general assertion that the States, acting as guardians of public morality,

[4] In fact, other portions of the same statute do make some such distinctions. For example, the statute also prohibits disturbing "the peace or quiet . . . by loud or unusual noise" and using "vulgar, profane, or indecent language within the presence or hearing of women or children, in a loud and boisterous manner." See n. 1, *supra.* This second-quoted provision in particular serves to put the actor on much fairer notice as to what is prohibited. It also buttresses our view that the "offensive conduct" portion, as construed and applied in this case, cannot legitimately be justified in this Court as designed or intended to make fine distinctions between differently situated recipients.

may properly remove this offensive word from the public vocabulary.

The rationale of the California court is plainly untenable. At most it reflects an "undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of expression." *Tinker* v. *Des Moines Indep. Community School Dist.*, 393 U. S. 503, 508 (1969). We have been shown no evidence that substantial numbers of citizens are standing ready to strike out physically at whoever may assault their sensibilities with execrations like that uttered by Cohen. There may be some persons about with such lawless and violent proclivities, but that is an insufficient base upon which to erect, consistently with constitutional values, a governmental power to force persons who wish to ventilate their dissident views into avoiding particular forms of expression. The argument amounts to little more than the self-defeating proposition that to avoid physical censorship of one who has not sought to provoke such a response by a hypothetical coterie of the violent and lawless, the States may more appropriately effectuate that censorship themselves. Cf. *Ashton* v. *Kentucky*, 384 U. S. 195, 200 (1966); *Cox* v. *Louisiana*, 379 U. S. 536, 550–551 (1965).

Admittedly, it is not so obvious that the First and Fourteenth Amendments must be taken to disable the States from punishing public utterance of this unseemly expletive in order to maintain what they regard as a suitable level of discourse within the body politic.[5] We

[5] The *amicus* urges, with some force, that this issue is not properly before us since the statute, as construed, punishes only conduct that might cause others to react violently. However, because the opinion below appears to erect a virtually irrebuttable presumption that use of this word will produce such results, the statute as thus construed appears to impose, in effect, a flat ban on the public utterance of this word. With the case in this posture, it does not seem inappro-

think, however, that examination and reflection will reveal the shortcomings of a contrary viewpoint.

At the outset, we cannot overemphasize that, in our judgment, most situations where the State has a justifiable interest in regulating speech will fall within one or more of the various established exceptions, discussed above but not applicable here, to the usual rule that governmental bodies may not prescribe the form or content of individual expression. Equally important to our conclusion is the constitutional backdrop against which our decision must be made. The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests. See *Whitney* v. *California,* 274 U. S. 357, 375–377 (1927) (Brandeis, J., concurring).

To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and

priate to inquire whether any other rationale might properly support this result. While we think it clear, for the reasons expressed above, that no statute which merely proscribes "offensive conduct" and has been construed as broadly as this one was below can subsequently be justified in this Court as discriminating between conduct that occurs in different places or that offends only certain persons, it is not so unreasonable to seek to justify its full broad sweep on an alternate rationale such as this. Because it is not so patently clear that acceptance of the justification presently under consideration would render the statute overbroad or unconstitutionally vague, and because the answer to appellee's argument seems quite clear, we do not pass on the contention that this claim is not presented on this record.

even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated. That is why "[w]holly neutral futilities . . . come under the protection of free speech as fully as do Keats' poems or Donne's sermons," *Winters* v. *New York*, 333 U. S. 507, 528 (1948) (Frankfurter, J., dissenting), and why "so long as the means are peaceful, the communication need not meet standards of acceptability," *Organization for a Better Austin* v. *Keefe*, 402 U. S. 415, 419 (1971).

Against this perception of the constitutional policies involved, we discern certain more particularized considerations that peculiarly call for reversal of this conviction. First, the principle contended for by the State seems inherently boundless. How is one to distinguish this from any other offensive word? Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the judgment below. For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.

Additionally, we cannot overlook the fact, because it

is well illustrated by the episode involved here, that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated. Indeed, as Mr. Justice Frankfurter has said, "[o]ne of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation." *Baumgartner* v. *United States*, 322 U. S. 665, 673–674 (1944).

Finally, and in the same vein, we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views. We have been able, as noted above, to discern little social benefit that might result from running the risk of opening the door to such grave results.

It is, in sum, our judgment that, absent a more particularized and compelling reason for its actions, the State may not, consistently with the First and Fourteenth Amendments, make the simple public display here involved of this single four-letter expletive a criminal offense. Because that is the only arguably sustainable rationale for the conviction here at issue, the judgment below must be

*Reversed.*

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACK join.

I dissent, and I do so for two reasons:

1. Cohen's absurd and immature antic, in my view, was mainly conduct and little speech. See *Street* v. *New York,* 394 U. S. 576 (1969); *Cox* v. *Louisiana,* 379 U. S. 536, 555 (1965); *Giboney* v. *Empire Storage Co.,* 336 U. S. 490, 502 (1949). The California Court of Appeal appears so to have described it, 1 Cal. App. 3d 94, 100, 81 Cal. Rptr. 503, 507, and I cannot characterize it otherwise. Further, the case appears to me to be well within the sphere of *Chaplinsky* v. *New Hampshire,* 315 U. S. 568 (1942), where Mr. Justice Murphy, a known champion of First Amendment freedoms, wrote for a unanimous bench. As a consequence, this Court's agonizing over First Amendment values seems misplaced and unnecessary.

2. I am not at all certain that the California Court of Appeal's construction of § 415 is now the authoritative California construction. The Court of Appeal filed its opinion on October 22, 1969. The Supreme Court of California declined review by a four-to-three vote on December 17. See 1 Cal. App. 3d, at 104. A month later, on January 27, 1970, the State Supreme Court in another case construed § 415, evidently for the first time. *In re Bushman,* 1 Cal. 3d 767, 463 P. 2d 727. Chief Justice Traynor, who was among the dissenters to his court's refusal to take Cohen's case, wrote the majority opinion. He held that § 415 "is not unconstitutionally vague and overbroad" and further said:

> "[T]hat part of Penal Code section 415 in question here makes punishable only wilful and malicious conduct that is violent and endangers public safety and order or that creates a clear and present danger that others will engage in violence of that nature.

> ". . . [It] does not make criminal any nonviolent act unless the act incites or threatens to incite others to violence . . . ." 1 Cal. 3d, at 773–774, 463 P. 2d, at 731.

*Cohen* was cited in *Bushman*, 1 Cal. 3d, at 773, 463 P. 2d, at 730, but I am not convinced that its description there and *Cohen* itself are completely consistent with the "clear and present danger" standard enunciated in *Bushman*. Inasmuch as this Court does not dismiss this case, it ought to be remanded to the California Court of Appeal for reconsideration in the light of the subsequently rendered decision by the State's highest tribunal in *Bushman*.

MR. JUSTICE WHITE concurs in Paragraph 2 of MR. JUSTICE BLACKMUN'S dissenting opinion.

[PUBLISH]

# In the United States Court of Appeals

## For the Eleventh Circuit

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No. 21-12583

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SPEECH FIRST, INC.,

Plaintiff-Appellant,

*versus*

ALEXANDER CARTWRIGHT,
in his individual capacity and his official capacity
as President of the University of Central Florida,

Defendant-Appellee,

DANA JUNTENEN,
in her official capacity as Director of the
University of Central Florida Office of Student

Rights and Responsibilities and Assistant
Dean of Students, et al.,

Defendants.

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Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 6:21-cv-00313-GAP-GJK

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Before NEWSOM and MARCUS, Circuit Judges, and STORY,* District Judge.

NEWSOM, Circuit Judge:

In this appeal from the denial of a request for a preliminary injunction, we are asked to decide whether two speech-related policies promulgated by the University of Central Florida—one that prohibits multiple forms of expression that are deemed to constitute "discriminatory harassment" and another that aims to address so-called "bias-related incidents"—likely violate the First Amendment. We must also decide, as a threshold matter, whether the

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* Honorable Richard W. Story, United States District Judge for the Northern District of Georgia, sitting by designation.

plaintiff—an organization called Speech First, Inc.—has standing to challenge the policies' constitutionality.

We hold (1) that Speech First has standing to sue because the challenged policies chill its members' speech and (2) that the discriminatory-harassment policy likely violates the First Amendment on the grounds that it is an overbroad and content- and viewpoint-based regulation of constitutionally protected expression. Because the district court never considered the bias-related-incidents policy's constitutionality on the merits—having erroneously concluded that Speech First lacked standing to challenge it—we remand for a determination of that issue.

## I

### A

Speech First, Inc. is a voluntary member organization dedicated to protecting students' free-speech rights. It represents students who attend universities across the country, including the University of Central Florida. Several of Speech First's UCF-based members have attested that they desire to express their beliefs and opinions about a range of topics but are inhibited from doing so by two University policies, which we'll call the "discriminatory-harassment" and "bias-related-incidents" policies, respectively, and which we'll describe in detail below.

One student, for instance—identified as "Student A" in Speech First's complaint—says that he wishes to express his views that "abortion is immoral," that the government "should not be

able to force religious organizations to recognize marriages with which they disagree," that "affirmative action is deeply unfair," that "a man cannot become a woman because he 'feels' like one," and that "illegal immigration is dangerous." He asserts that he desires to "speak passionately" about those (and other) topics, that he wishes to "engage in open and robust intellectual debate" about them, and that he hopes to "encourage [other students] to change their minds or, at a minimum, to understand his views." Finally, he says that he "does not fully express himself or talk about certain issues because he fears" that sharing his beliefs may subject him to the University's discriminatory-harassment policy, bias-related-incidents policy, or both. Two other UCF students—identified as "Student B" and "Student C"—have expressed similar desires and fears.

## B

Before we go any further, we should describe the challenged policies in some detail. Rather than characterize them—and in the interest of providing the fullest possible context—we will lay out their relevant provisions in full.

### 1

First, the discriminatory-harassment policy. As its name indicates, the policy prohibits "discriminatory harassment," which it defines in the following terms:

> Discriminatory harassment consists of verbal, physical, electronic or other conduct based upon an

> individual's race, color, ethnicity, national origin, religion, non-religion, age, genetic information, sex (including pregnancy and parental status, gender identity or expression, or sexual orientation), marital status, physical or mental disability (including learning disabilities, intellectual disabilities, and past or present history of mental illness), political affiliations, veteran's status (as protected under the Vietnam Era Veterans' Readjustment Assistant Act), or membership in other protected classes set forth in state or federal law that interferes with that individual's educational or employment opportunities, participation in a university program or activity, or receipt of legitimately-requested services meeting the description of either *Hostile Environment Harassment* or *Quid Pro Quo Harassment*, as defined [below].
>
> Discriminatory harassment may take many forms, including verbal acts, name-calling, graphic or written statements (via the use of cell phones or the Internet), or other conduct that may be humiliating or physically threatening.

The policy, in turn, defines "Hostile Environment Harassment" as follows:

> Discriminatory harassment that is so severe or pervasive that it unreasonably interferes with, limits, deprives, or alters the terms or conditions of education (e.g., admission, academic standing, grades, assignment); employment (e.g., hiring, advancement, assignment); or participation in a university program or

> activity (e.g., campus housing), when viewed from both a subjective and objective perspective.

The policy states that "[i]n evaluating whether a hostile environment exists, the university will consider the totality of known circumstances, including, but not limited to" the following factors:

> • The frequency, nature and severity of the conduct;
>
> • Whether the conduct was physically threatening;
>
> • The effect of the conduct on the complainant's mental or emotional state;
>
> • Whether the conduct was directed at more than one person;
>
> • Whether the conduct arose in the context of other discriminatory conduct or other misconduct;
>
> • Whether the conduct unreasonably interfered with the complainant's educational or work performance and/or university programs or activities; and
>
> • Whether the conduct implicates concerns related to academic freedom or protected speech.

The policy's definition of "Hostile Environment Harassment" goes on to state (1) that "[a] hostile environment can be created by pervasive conduct or by a single or isolated incident, if sufficiently severe," (2) that "[t]he more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment, particularly if the conduct is physical," and (3) that "an isolated incident, unless sufficiently serious, does not amount to Hostile Environment Harassment."

There is one last piece of the discriminatory-harassment puzzle. Referencing the discriminatory-harassment policy, UCF's Student Handbook states that "[s]tudents are prohibited" not only from engaging in the prohibited conduct themselves, but also from "[c]ondoning or encouraging acts of harmful behavior as defined [in the discriminatory-harassment policy] or failing to intervene during an act of harmful behavior while it is occurring."

* * *

So, in sum: The discriminatory-harassment policy prohibits "verbal, physical, electronic, or other conduct" based on a long list of characteristics including, among others, "religion [or] non-religion," "genetic information," and "political affiliation[]." The policy applies to any conduct that, for instance, "unreasonably . . . alters" another student's "participation in a university program or activity." It specifies that discriminatory harassment "may take many forms"—including, broadly, "verbal acts, name-calling, graphic or written statements . . . or other conduct that may be humiliating"—and it utilizes a "totality of known circumstances" approach, based on a non-exhaustive list of factors, to determine whether a speaker's expression satisfies the "unreasonabl[e] . . . alter[ation]" standard. Lastly, the policy prohibits students not only from committing the specified acts, but also from "[c]ondoning," "encouraging," or even "failing to intervene" to stop them.

**2**

Separate from the discriminatory-harassment policy—but seemingly aimed at addressing similar issues—UCF maintains a policy which seeks to prevent and redress what it calls "bias-related incidents." The "Bias-Related Incidents" policy has several parts. First, it defines the key term—"bias-related incident"—as follows:

> A bias-related incident is any behavior or action directed towards an individual or group based upon actual or perceived identity characteristics or background. This bias motivates an individual to act in an offensive manner towards an individual or group including but not limited to: race, sex (including gender identity/expression), color, religion, ancestry, national origin, age, disability, veteran status, military status, or sexual orientation. Such acts may result in creating a hostile environment and may have a negative psychological, emotional, or physical impact on an individual, group, and/or community.

Second, the policy provides that "[b]ias-related incidents occur without regard to whether the act is legal, illegal, intentional, or unintentional," and that such an incident need "not necessarily rise to the level of a crime, a violation of state law, university policy, or the student code of conduct." Rather, a "bias act" is one that "may contribute to creating an unsafe, negative, unwelcoming environment [for] the victim, or anyone who shares the same social identity as the victim, and/or community members at the university."

Third, the bias-related-incidents policy states that "[i]ncidents which occur on campus that are not covered by formal policies and procedures but have the effect of harming individuals or groups may be addressed by the Just Knights Response Team (JKRT) protocol"—of which more below. That "protocol may be initiated in cases when it is clear that the incidents have harmful effects on persons or groups based upon their race, sex (including gender identity/expression), color, religion, ancestry, national origin, age, disability, veteran status, military status, or sexual orientation."

Finally, the policy provides a non-exhaustive list of "types of bias-related incidents." They "may include (but are not limited to)" any of 13 behaviors, ranging from "physical injury" and "stalking," on one end of the spectrum, to "graffiti [and] signs," "confrontation," and "gestures," on the other end.

As just noted, the bias-related-incidents policy is implemented by the JKRT, which is made up of UCF students, faculty, and staff. University staff members who serve on the JKRT include representatives from the offices of Student Development and Enrollment Services, Housing and Residence Life, Social Justice and Advocacy, Faculty Relations, and the UCF Police Department.

UCF's website describes the JKRT as follows:

> The JKRT . . . is here to provide assistance in the unfortunate event that you have experienced or witnessed a hate or bias related incident. This site is designed to allow the reporting of bias incidents to the

> JKRT team to ensure the most appropriate university response.
>
> UCF is also committed to tracking patterns of bias and other incidents at the University that might prevent the community from thriving. It is our goal, as a team, to effect positive change in our campus community by providing a platform for individuals to report hurtful actions that have occurred. In return, we will create an open and transparent university community response to the handling of these incidents.
>
> JKRT is intended to be a resource for anyone who wants to examine issues of bias, discrimination, or hate. Whatever your reasons are for visiting this site, please be assured that UCF holds as one of its goals to create a more inclusive and diverse campus. We are also committed to providing a safe and welcoming living and learning community for all our students.

The website goes on to explain the JKRT's "Purpose Statement" in the following terms:

> The purpose of the *Just Knights Response Team* (JKRT) is to act as a clearinghouse for any bias-related incidents that may occur on UCF campuses. In this role, the JKRT will receive, monitor, refer, and, as necessary, coordinate university resources to these incidents that impact the university community.
>
> The team, made up of UCF faculty, staff, and students, provides a safe space for students, who are witnesses to or targets of bias, to communicate

> experiences, to ensure comprehensive responses, and proactively address issues of civility and respect.

And it describes the JKRT's "Policy" as follows:

> The Just Knights Response Team (JKRT) is an inter-divisional team that assesses bias incidences in order to coordinate university resources for the creation of effective interventions and future incident prevention programming. The JKRT creates timely interventions to incidents that are sensitive to the rights of all parties involved. It is intended that any JKRT programming or intervention will be educational at its core. It will involve a variety of activities including discussion, mediation, training, counseling and consensus building. Through the voluntary participation of the persons involved in and impacted by bias incidences, the JKRT's interventions and prevention programming will foster a sense of civility and campus community encompassing respect and understanding that supports a multicultural and diverse campus environment.

A student who feels that he has been the victim of a bias-related incident can report it anonymously through a complaint form on the JKRT's website. The complainant is directed to describe the incident (date, location, etc.), to "list the individuals involved," and to specify his or her "desired outcome." The JKRT's website warns that the information provided by a complainant "may be shared with the Office of Student Conduct," the "Office of

Student Rights and Responsibility," or the "UCF Police Department."[1]

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[1] When a UCF student is reported to have engaged in a bias-related incident, the JKRT sends that student the following email:

> Greetings,
>
> My name is {INSERT NAME}. The University of Central Florida is committed to tracking patterns of bias and other incidents at the university that might prevent the community from thriving. I am a university employee who serves on the Just Knights Response Team (JKRT).
>
> The Just Knights Response Team (JKRT) is an interdivisional team that assesses bias incidences in order to coordinate university resources for the creation of effective interventions and future incident prevention programming. The JKRT creates timely interventions for incidents that are sensitive to the rights of all parties involved. It is intended that any JKRT programming or intervention will be educational at its core. Interventions involve a variety of activities including discussion, mediation, training, counseling, and consensus-building. Through the voluntary participation of the persons involved in and impacted by bias incidences, the JKRT's interventions and prevention programming will foster a sense of civility and campus community encompassing respect and understanding that supports a multicultural and diverse campus environment.
>
> Please note, JKRT is not an extension of UCF Human Resources nor the Office of Student Rights and Responsibilities. We have no authority to dispense punitive measures. We value anonymity and privacy, however, at times there is certain information that we must disclose to other university

* * *

So again, to sum up: The bias-related-incidents policy creates a mechanism by which a UCF student can be anonymously accused of an act of "hate or bias"—*i.e.*, an "offensive" act, even if "legal" and "unintentional," that is directed toward another based on any of a number characteristics that echo (but do not precisely mirror) those listed in the discriminatory-harassment policy. The JKRT "monitor[s]" and "track[s]" bias-related incidents, "coordinate[s] university resources," marshals a "comprehensive

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officers (ex. Title IX violations, criminal activity and/or imminent threats).

We have received a report of an incident you may have been involved in or reported. I would like the opportunity to speak with you regarding this matter. Your participation is voluntary.

If you are interested in speaking with me, please reply back with a preferred contact number. I will call you to schedule a time for us to meet or speak via the phone. If I do not receive a reply within two weeks, I will assume you do not have an interest in speaking with me and will close out this JKRT case.

I look forward to hearing from you.

{INSERT NAME}
University of Central Florida
jkrt@ucf.edu

response[],” and, where necessary, coordinates “interventions” among affected parties.

## C

Speech First brought suit in the Middle District of Florida, contending (as relevant here) that the discriminatory-harassment and bias-related-incidents policies violate the First Amendment. In particular, Speech First alleged that both policies are unconstitutionally overbroad and that the discriminatory-harassment policy also impermissibly restricts speech based on content and viewpoint.

Shortly after filing suit, Speech First sought a preliminary injunction, which the district court refused. As an initial matter, the court held that Speech First lacked Article III standing to challenge the bias-related-incidents policy. The court reasoned that because the JKRT, which implements the policy, “has no authority to discipline students and cannot compel students to engage with it,” its conduct cannot (absent evidence to the contrary) “objectively chill” student expression. Accordingly, the court concluded that Speech First had “failed to show that the JKRT creates a reasonable fear of prosecution” and, therefore, had failed to “establish its [m]embers’ standing to challenge the JKRT at the preliminary injunction stage.” The district court held that Speech First had standing to challenge the discriminatory-harassment policy because “UCF can discipline students for violating” it, but it rejected Speech First’s arguments on the merits. In particular, the court held that the policy could “only be read to reach unprotected conduct” and,

accordingly, that Speech First's members "cannot reasonably believe that they would be punished for simply expressing unpopular viewpoints."[2]

## II

We begin, as we must, by determining whether Speech First has the requisite standing to challenge UCF's policies. An association like Speech First "has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). Here, all seem to agree that the standing question turns on whether Speech First's members would have standing to sue on their own.

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[2] "We review standing determinations *de novo*." *BBX Cap. v. Fed. Deposit Ins. Corp.*, 956 F.3d 1304, 1312 (11th Cir. 2020) (per curiam). We review "the district court's decision to deny a preliminary injunction for abuse of discretion, though we review and correct errors of law without deference to the district court." *Brown v. Sec'y, U.S. Dep't of Health & Hum. Servs.*, 4 F.4th 1220, 1224 (11th Cir. 2021) (quotation marks omitted). "A district court abuses its discretion when its factual findings are clearly erroneous, when it follows improper procedures, when it applies the incorrect legal standard, or when it applies the law in an unreasonable or incorrect manner." *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1247 (11th Cir. 2016).

A

The tripartite test for Article III standing, as articulated by the Supreme Court, is well known:

> *First*, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. *Second*, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. *Third*, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

*Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (cleaned up); *see also Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016); *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021). "[E]ach element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561. Because this case hasn't progressed past the pleading stage, "general factual allegations of injury" may suffice so long as they "plausibly and clearly allege a concrete injury." *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 924 (11th Cir. 2020) (en banc) (quotation omitted).

There is no doubt—or dispute—that the members' claimed injury is "concrete and particularized" within the meaning of what we'll call *Lujan*'s prong (1a) because they have alleged a deprivation of their First Amendment right to free speech. *See Pedro v. Equifax, Inc.*, 868 F.3d 1275, 1279 (11th Cir. 2017) ("[V]iolation of the right to free speech . . . can be concrete."); *Otto v. City of Boca Raton*, 981 F.3d 854, 870 (11th Cir. 2020) (same); *see also Spokeo*, 578 U.S. at 340 (citing *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) for the proposition that free-speech violations are concrete injuries); *TransUnion*, 141 S. Ct. at 2204 (same). Nor is there any real dispute that the members' injury is "traceable" to UCF's policies within the meaning of *Lujan*'s prong (2) or that it is "redress[able]" within the meaning of prong (3).

The standing question here thus turns on whether the members' injury is "imminent, not conjectural or hypothetical," within the meaning of *Lujan*'s prong (1b). In answering that question, we must first acknowledge a bit of dissonance in the doctrine. In *Susan B. Anthony List v. Driehaus*, the Supreme Court enumerated three criteria that, as a general matter, govern a plaintiff's standing to bring the sort of pre-enforcement challenge that Speech First has brought here: The plaintiff must show (1) that he has "an intention to engage in a course of conduct arguably affected with a constitutional interest," (2) that his conduct is "arguably proscribed," and (3) that he is subject to "a credible threat of enforcement." 573 U.S. 149, 159, 162 (2014) (cleaned up). The district court here held that Speech First's standing turned on the third, credible-threat-of-

enforcement requirement: Because "UCF can discipline students for violating" the discriminatory-harassment policy, it reasoned that Speech First had standing to challenge it; but because "the JKRT does not have the independent authority to discipline students," it concluded that Speech First lacked standing to challenge the bias-related-incidents policy.

Before addressing the district court's conclusions, we pause to clarify our own pre-enforcement-challenge doctrine, at least as it applies in First Amendment cases. We have long emphasized that "[t]he injury requirement is most loosely applied—particularly in terms of how directly the injury must result from the challenged governmental action—where [F]irst [A]mendment rights are involved, because of the fear that free speech will be chilled even before the law, regulation, or policy is enforced." *Hallandale Pro. Fire Fighters Loc. 2238 v. City of Hallandale*, 922 F.2d 756, 760 (11th Cir. 1991). More recently—and specifically—we held that "[l]itigants who are being 'chilled from engaging in constitutional activity' . . . suffer a discrete harm independent of enforcement, and that harm creates the basis for our jurisdiction." *Dana's R.R. Supply v. Att'y Gen., Fla.*, 807 F.3d 1235, 1241 (11th Cir. 2015). Therefore—and most recently—we stressed that "[w]here the alleged danger of legislation is one of self-censorship, harm can be realized even without an actual prosecution." *Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293, 1305 (11th Cir. 2017) (en banc) (quotation marks omitted).

Accordingly, to determine whether a First Amendment plaintiff has standing, we simply ask whether the "operation or enforcement," *Georgia Latino All. for Hum. Rts. v. Governor of Ga.*, 691 F.3d 1250, 1257 (11th Cir. 2012) (cleaned up), of the government policy would cause a reasonable would-be speaker to "self-censor[]," *Wollschlaeger*, 848 F.3d at 1305—even where the policy "fall[s] short of a direct prohibition against the exercise of First Amendment rights," *Laird v. Tatum*, 408 U.S. 1, 11 (1972). In making that assessment, the threat of formal discipline or punishment is relevant to the inquiry, but it is not decisive. The fundamental question under our precedent—as well as under the precedent of other courts that have decided similar "speech code" cases—is whether the challenged policy "objectively chills" protected expression. *See, e.g.*, *Speech First, Inc. v. Fenves*, 979 F.3d 319, 330–35 (5th Cir. 2020) (holding, in campus-speech case, that fear of the investigative process is sufficient to create an "objective chill" that gives rise to standing); *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 764 (6th Cir. 2019) (same); *Speech First, Inc. v. Killeen*, 968 F.3d 628, 639 n.1 (7th Cir. 2020) (acknowledging, in campus-speech case, that there is "some degree of overlap" between the "credible threat" and "objective chill" inquiries).

**B**

As already noted, Speech First challenges two UCF policies. For reasons we will explain, because the application of those policies objectively chills its members' speech, Speech First has standing to challenge both.

1

We begin with whether Speech First has standing to challenge the discriminatory-harassment policy. The district court held that it did. We agree.

The discriminatory-harassment policy objectively chills speech because its operation would cause a reasonable student to fear expressing potentially unpopular beliefs. As already explained, UCF's discriminatory-harassment policy prohibits a broad swath of expressive activity—both "verbal" and "electronic"—touching on any of a number of characteristics, including "race," "national origin," "religion [or] non-religion," "genetic information," "sex," and "political affiliation[]." The policy says that the prohibited speech "may take many forms, including verbal acts, name-calling, graphic or written statements," or, even more broadly, "other conduct that may be humiliating." And it uses a "totality of known circumstances" approach, based on a long but non-exhaustive list of factors, to determine whether speech "unreasonably . . . alters," among other things, a student's "participation in a university program." Expanding its reach even further, the policy prohibits students not only from engaging in prohibited speech themselves, but also from "encouraging" or "condoning" other students' speech, or even "failing to intervene" to stop it. And further still, the student code of conduct states that the rules contained therein—including the discriminatory-harassment policy—"should be read broadly and are not designed to define prohibited conduct in exhaustive terms."

The discriminatory-harassment policy's imprecision exacerbates its chilling effect. To take just one example, what does it mean for one student's speech to "unreasonably . . . alter[]" another student's educational experience? Both terms—"unreasonably" and "alter[]"—are pretty amorphous, their application would likely vary from one student to another, and the University's totality-of-known-circumstances approach to determining whether particular speech crosses the line only makes matters worse. To be clear, these concerns aren't speculative. At oral argument, we asked the University's lawyer a series of questions about whether particular statements would violate the discriminatory-harassment policy: (1) "abortion is immoral"; (2) "unbridled open immigration is a danger to America on a variety of levels"; and (3) "the Palestinian movement is antisemitic."[3] To his considerable credit—but to

[3] In full:

1. "Suppose I were to distribute pamphlets at a time that the university allows me to, or suppose I were to be permitted to speak at a time and a place the university allows me to speak, and I were to say that in my view, abortion is immoral, it's a sin against God, and it will yield eternal damnation. Suppose I were to hold that view. It's a religious view. It's a view that I'm expressing through speech at a time and a place that the University allows me to speak. Would that run me afoul of the harassment policy?" Oral Arg. at 29:10–29:57.

2. "Suppose I were to use my opportunity to speak as a student on campus and I were to say that the immigration laws of the United States are deeply flawed, that unbridled open immigration is a danger to America on a variety of levels. We ought to throw up a wall, etc., etc.,

the policy's considerable discredit—he candidly acknowledged that while "it d[id] not sound to [him]" like the speech would be proscribed under the policy, he couldn't say for sure because "the university will consider all the facts and circumstances there" and because he couldn't "prejudge everything." Oral Arg. at 28:43–33:55. If UCF's own attorney—as one intimately familiar with the University's speech policies—can't tell whether a particular statement would violate the policy, it seems eminently fair to conclude that the school's students can't either.

Although it arose in a different context, our decision in *Harrell v. Florida Bar*, 608 F.3d 1241 (11th Cir. 2010), supports Speech First's position. In that case, we held that a lawyer's speech was chilled—and that he therefore had standing to sue—where certain Florida bar rules failed to provide a "person of ordinary intelligence a reasonable opportunity to know what is prohibited and fail[ed] to provide explicit standards for those who apply them." *Id.* at 1254 (quotation omitted). Like the lawyer in *Harrell*, the students here

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etc. Would that speech be proscribed under the harassment policy? Might not a student on campus who fell into the category of being a 'dreamer' take deep offense to that and say that that constituted harassment [within the meaning of the] policy? It was severe. It went to his very right to be where he was, to learn on that campus." *Id.* at 31:36–32:33.

3. "Suppose [a student] were to say, at a time that the University allows her or him to speak, that the Palestinian movement is antisemitic, it's riddled with antisemitism from beginning to end. Would that speech amount to harassment?" *Id.* at 41:39–42:00.

are indisputably subject to the discriminatory-harassment policy. And like the regulations in *Harrell*, UCF's policy fails to provide students with specific enough information to determine whether any particular statement is permitted or prohibited.

Given the discriminatory-harassment policy's astonishing breadth—and slipperiness—we think it clear that a reasonable student could fear that his speech would get him crossways with the University, and that he'd be better off just keeping his mouth shut. That sort of "objective chill" suffices to give the affected students—and thus Speech First—standing.

**2**

The district court held that Speech First lacked standing to challenge the bias-related-incidents policy because, the court said, the JKRT couldn't punish students itself but, rather, could only refer them to other university actors for discipline. We hold that the district court erred in focusing so singularly on the JKRT's power to punish. The reason, already explained, is that a government actor can objectively chill speech—through its implementation of a policy—even without formally sanctioning it. Punishment is no doubt relevant to the objective-chill analysis, and may well be sufficient to prove the requisite chill, but analogous precedent makes clear that it is not decisive and, in any event, is not uniformly necessary.

The seminal case is *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). There, the Supreme Court considered the

constitutionality of certain actions of the "Rhode Island Commission to Encourage Morality in Youth," whose charge it was to "educate the public concerning any book, picture, pamphlet, ballad, printed paper or other thing containing obscene, indecent or impure language, or manifestly tending to the corruption of the youth." *Id.* at 59. The commission's usual practice was to notify a bookseller "on official . . . stationery that certain designated books or magazines distributed by him had been reviewed by the Commission and had been declared by a majority of its members to be objectionable for sale," to "thank[ him] in advance[] for his 'cooperation,'" to "remind[ him] of the Commission's duty to recommend to the Attorney General prosecution of purveyors of obscenity," and to inform him that "[c]opies of the lists of 'objectionable' publications were circulated to local police departments." *Id.* at 61–63.

The state defended against the bookseller's contention that the challenged practices chilled his First Amendment rights on the ground that the commission had no formal disciplinary authority: "[I]t does not regulate or suppress obscenity but simply exhorts booksellers and advises them of their legal rights." *Id.* at 66. The Court rejected as "untenable" the state's argument, which was "premised on the Commission's want of power to apply formal legal sanctions." *Id.* The Court likewise rejected the state's contention that the bookseller's "compliance with the Commission's directives" was in any meaningful sense "voluntary," despite the fact that a bookseller was technically "'free' to ignore" that body's

notices: "People do not," the Court emphasized, "lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around." *Id.* at 68. Rather, the Court held that even "informal sanctions"—including "coercion, persuasion, and intimidation"—can sufficiently inhibit expression as to violate the First Amendment, and to give a plaintiff standing to sue. *Id.* at 64 n.6, 67. It is necessary, the Court held, to "look through forms to the substance and recognize that informal censorship may sufficiently inhibit"—*i.e.*, chill—"the circulation of publications to warrant injunctive relief." *Id.* at 67.

The Second Circuit's decision in *Okwedy v. Molinari*, 333 F.3d 339 (2d Cir. 2003) (per curiam), is similar. The plaintiffs in that case hired a billboard company to display signs in Staten Island denouncing homosexuality. *Id.* at 340. The Staten Island Borough president sent a letter to the billboard company stating that the signs were "unnecessarily confrontational and offensive" and "convey[ed] an atmosphere of intolerance . . . [un]welcome in our Borough," and he asked a representative of the company to contact the "Chair of [his] Anti-Bias Task Force . . . to discuss further the issues [he had] raised in th[e] letter." *Id.* at 341–42. Capitulating, the billboard company removed the signs. *Id.* at 342.

When the plaintiffs sued, the district court dismissed their action, "rel[ying] heavily on . . . the fact" that the borough president "did not have direct regulatory or decisionmaking authority" over the billboard company. *Id.* at 343. The Second Circuit reversed, holding that "[a]lthough the existence of regulatory or

other direct decisionmaking authority is certainly relevant to the question of whether a government official's comments were unconstitutionally threatening or coercive, a defendant without such direct regulatory or decisionmaking authority can also exert an impermissible type or degree of pressure." *Id.* The billboard company, the court of appeals emphasized, "could reasonably have believed," based on the information available to it, that the borough president "intended to use his official power to retaliate against it if it did not respond positively to his entreaties." *Id.* at 344.

*Bantam Books* and *Okwedy* demonstrate a commonsense proposition: Neither formal punishment nor the formal power to impose it is strictly necessary to exert an impermissible chill on First Amendment rights—indirect pressure may suffice. To be sure, the University wasn't quite as heavy-handed here as were the government actors in *Bantam Books* and *Okwedy*. But just as surely, the students targeted here are—for the most part—teenagers and young adults who, it stands to reason, are more likely to be cowed by subtle coercion than the relatively sophisticated business owners in those cases. *Cf. Fare v. Michael C.*, 442 U.S. 707, 725 (1979) (considering a defendant's age in determining whether a *Miranda* waiver is voluntary); *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973) (considering a defendant's "youth" as a factor in determining whether his consent to a search was voluntary); *United States v. Owen*, 963 F.3d 1040, 1049 (11th Cir. 2020) (considering a defendant's age in determining whether the "waiver of his right to

counsel was knowing and voluntary").[4] And the question for us is whether the average college-aged student would be intimidated—and thereby chilled from exercising her free-speech rights—by subjection to the bias-related-incidents policy and the JKRT's role in enforcing it.

The answer to that question, we think, is yes. No reasonable college student wants to run the risk of being accused of "offensive," "hostile," "negative," or "harmful" conduct—let alone "hate or bias." Nor would the average college student want to run the risk that the University will "track[]" her, "monitor[]" her, or mount a "comprehensive response[]" against her. And as with the discriminatory-harassment policy, the breadth and vagueness of the bias-related-incidents policy exacerbates the chill that the average student would feel. The policy, for instance, reaches "any behavior or action"—even if both "legal" and "unintentional"—that is "directed towards an individual or group" based on "actual or perceived identity characteristics"—including but not limited to

[4] There is, we observe, a certain irony in the facts (1) that UCF created the JKRT to address situations in which students felt intimidated or marginalized and (2) that now, Speech First's members claim to have been intimidated and marginalized by the JKRT—"kind of like . . . snowflakes all around." Oral Arg. at 10:10–10:51. We asked Speech First's lawyer at oral argument why *everyone* shouldn't just "put on their big boy and big girl pants" and deal with some adversity. *Id.* His answer, we think, captures a valid distinction: "The state is a really big boy." *Id.* at 10:52–11:20. The University—*i.e.*, the state—can far more easily intimidate, and thereby objectively chill, college students than can those students' peers. And objective chill is the standard.

those rooted in any of at least 11 different traits. So too, the policy defines a "bias act" as anything that "may contribute to creating an unsafe, negative, unwelcoming environment [for] the victim, or anyone who shares the same social identity as the victim, and/or community members of the university." And the policy applies to a non-exhaustive laundry list of behaviors—including, among others, "graffiti [and] signs," "confrontation," and "gestures." Pair that broad, vague, and accusatory language with the task-force-ish name of the investigating organization—the Just Knights *Response Team*—and we think it clear that the average college student would be intimidated, and quite possibly silenced, by the policy. Because the bias-related-incidents policy objectively chills student speech, Speech First's members have standing to challenge it.[5]

## III

On, then, to the merits. We consider four factors when determining the propriety of preliminary injunctive relief: (1) substantial likelihood of success on the merits, (2) irreparable harm, (3) the balance of equities, and (4) the public interest. *Gonzalez v. Governor of Georgia*, 978 F.3d 1266, 1271 (11th Cir. 2020).

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[5] To be clear, the fact that the JKRT's website once refers to the accused student's participation as "voluntary" doesn't change the overall tenor of the message conveyed there—namely, that if your speech crosses our line, we will come after you. The freedom that a student has to ignore the JKRT process is akin, we think, to the freedom that a child has to refuse his parent when she asks, "Would you please clean up your room?" *Cf. Bantam Books*, 372 U.S. at 68.

Likelihood of success on the merits "is generally the most important of the four factors." *Id.* at 1271 n.12 (quotation omitted).

A

We begin with the discriminatory-harassment policy. We conclude that Speech First is substantially likely to establish that the policy is both (1) impermissibly overbroad and (2) a content- and viewpoint-based restriction of speech.

1

The discriminatory-harassment policy is almost certainly unconstitutionally overbroad. The overbreadth doctrine is designed "to prevent the chilling of protected expression." *Massachusetts v. Oakes*, 491 U.S. 576, 584 (1989). A regulation that covers substantially more speech than the First Amendment allows is overbroad and thus invalid. *See FF Cosms. FL, Inc. v. City of Miami Beach*, 866 F.3d 1290, 1303 (11th Cir. 2017). We've already plowed much of this ground in assessing Speech First's standing to sue, but briefly, the policy (1) prohibits a wide range of "verbal, physical, electronic, and other" expression concerning any of (depending on how you count) some 25 or so characteristics; (2) states that prohibited speech "may take many forms, including verbal acts, name-calling, graphic or written statements" and even "other conduct that *may* be humiliating"; (3) employs a gestaltish "totality of known circumstances" approach to determine whether particular speech, for instance, "unreasonably . . . alters" another student's educational experience; and (4) reaches not only a student's own

speech, but also her conduct "encouraging," "condoning," or "failing to intervene" to stop another student's speech.

The policy, in short, is staggeringly broad, and any number of statements—some of which are undoubtedly protected by the First Amendment—could qualify for prohibition under its sweeping standards. To take a few obvious examples, the policy targets "verbal, physical, electronic or other conduct" based on "race," "ethnicity," "religion [or] non-religion," "sex," and "political affiliation." Among the views that Speech First's members have said they want to advocate are that "abortion is immoral," that the government "should not be able to force religious organizations to recognize marriages with which they disagree," that "affirmative action is deeply unfair," that "a man cannot become a woman because he 'feels' like one," that "illegal immigration is dangerous," and that "the Palestinian movement is anti-Semitic." Doc. 30 at 22, 27. Whatever the merits or demerits of those sorts of statements, they seem to us to constitute "core political speech," with respect to which "First Amendment protection is 'at its zenith.'" *Buckley v. Am. Const. L. Found., Inc.*, 525 U.S. 182, 183 (1999) (citation omitted)); *accord, e.g.*, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995). Because the discriminatory-harassment policy restricts political advocacy and covers substantially more speech than the First Amendment permits, it is fatally overbroad.

**2**

The University's policy isn't just overbroad, it's also an impermissible content- and viewpoint-based speech restriction—or, at the very least, likely so.

"Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2014); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid." (citations omitted)). A governmental regulation of speech is content-based if it applies by its terms to speech "because of the topic discussed" or if, even though facially neutral, it "cannot be justified without reference to the content" of the speech. *Reed*, 576 U.S. at 163–64 (quotation marks omitted). In other words, a regulation is content-based if "'enforcement authorities' [must] 'examine the content of the message that is conveyed to determine whether' a violation has occurred." *McCullen v. Coakley*, 573 U.S. 464, 479 (2014) (citation omitted).

Viewpoint discrimination is even more anathematic to the First Amendment: "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination." *Rosenberger v. Rectors and Visitors of the Univ. of Virginia*, 515 U.S. 819, 829 (1995) (citation omitted). The Supreme Court

has reiterated time and again—and increasingly of late—the "bedrock First Amendment principle" that "[s]peech may not be banned on the ground that it expresses ideas that offend." *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017). "[R]estrictions based on content must satisfy strict scrutiny, and those based on viewpoint are prohibited," seemingly as a *per se* matter. *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1885 (2018); *see also, e.g.*, *Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019) ("The government may not discriminate against speech based on the ideas or opinions it conveys.").

UCF's discriminatory-harassment policy seems to us both a content- and a viewpoint-based speech restriction. It is content-based because the University must "examine the content of the message that is conveyed to determine whether" it harasses another student "based upon" any of a long list of characteristics—*e.g.*, race, sex, political affiliation, etc. *McCullen*, 573 U.S. at 479. Because the policy is a content-based restriction, it must satisfy strict scrutiny, and we doubt it can. Although the University may have a compelling interest in preventing students from disrupting its educational environment, its policy doesn't seem to us to be narrowly tailored to that end. As already explained, the policy covers speech that pertains to any of a number of characteristics, can take any of a variety of forms (including "verbal acts" and "written statements," and "other conduct that *may* be humiliating"), and that is deemed, by reference to a non-exhaustive seven-factor test, to "unreasonably . . . alter" another student's educational experience—and, indeed, to the acts of "condoning or encouraging," or even

"failing to intervene" to stop another from speaking. That, with respect, is the opposite of narrow tailoring.

In any event, the discriminatory-harassment policy likely goes beyond content-discrimination to discriminate on the basis of viewpoint. Even within the category of harassing speech, UCF prohibits *only* speech that is "discriminatory." To borrow the Supreme Court's recent observation about similarly loaded terms in one of the Lanham Act's trademark registration provisions, which it found impermissibly viewpoint-based, "[t]he meaning[] of" the word "discriminatory" is "not mysterious"—it connotes speech that denigrates rather than validates certain characteristics. *Iancu*, 139 S. Ct. at 2299. Here, as there, "resort to [the] dictionaries," *id.*, confirms that commonsense conclusion. *See, e.g.*, *Discriminatory*, Oxford English Dictionary (online ed.) ("That treats a person or group in an unjust or prejudicial manner."). In prohibiting only one perspective, UCF targets "particular views taken by" students, *Rosenberger*, 515 U.S. at 829, and thereby chooses winners and losers in the marketplace of ideas—which it may not do. *See, e.g.*, *Mansky*, 138 S. Ct. at 1885; *Tam*, 137 S. Ct. at 1767 (Kennedy, J., concurring in part and concurring in the judgment) ("The danger of viewpoint discrimination is that the government is attempting to remove certain ideas or perspectives from a broader debate. That danger is all the greater if the ideas or perspectives are ones a

particular audience might think offensive, at least at first hearing."). [6]

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[6] There is one loose end. The University seeks the benefit of the more deferential First Amendment standard articulated in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), and its progeny. In particular, the University asserts that its discriminatory-harassment policy complies with *Tinker* because it prevents campus disruption. The district court likewise relied heavily on *Tinker*'s indulgent framework.

There are three problems. First, it's not at all clear that *Tinker*'s more lenient standard applies in the university—as opposed to the elementary- and secondary-school—setting. The caselaw sends mixed signals. On the one hand, this Court applied *Tinker* to speech regulations in a college setting where a student claimed that the college's anti-stalking policy was "unconstitutionally overbroad and vague." *Doe v. Valencia Coll.*, 903 F.3d 1220, 1229 (11th Cir. 2018). And the Supreme Court once cited *Tinker* for the proposition that state universities have an "undoubted prerogative to enforce reasonable rules governing student conduct"—even while reaffirming that "state colleges and universities are not enclaves immune from the sweep of the First Amendment." *Papish v. Bd. of Curators of Univ. of Missouri*, 410 U.S. 667, 669–70 (1973). On the other hand, the Supreme Court has emphasized that its "precedents . . . leave no room for the view that, because of the acknowledged need for order [in state educational institutions,] First Amendment protections should apply with less force on college campuses than in the community at large," *Healy v. James*, 408 U.S. 169, 180 (1972), and further, that academic freedom in a university setting is "a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom," and that universities are "peculiarly the marketplace of ideas." *Keyishian*, 385 U.S. at 603 (cleaned up). In the same way, we have emphasized "that the dangers of viewpoint discrimination are *heightened* in the university setting." *Gay Lesbian Bisexual All. v. Pryor*, 110 F.3d 1543, 1550 (11th Cir. 1997) (citing *Rosenberger*, 515 U.S. 819 (1995)).

***3***

Having concluded that Speech First is likely to succeed on the merits—the most important preliminary-injunction criterion—we turn briefly to the remaining criteria. First, in the absence of a preliminary injunction, Speech First would undoubtedly suffer irreparable harm—which we have called "the sine qua non of injunctive relief," *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000)

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Second, and separately, the Supreme Court recently limited *Tinker*'s application, even in the high-school setting. It held that "courts must be more skeptical of a school's efforts to regulate off-campus speech" and that "[w]hen it comes to political or religious speech that occurs outside school or a school program or activity, the school will have a heavy burden to justify intervention." *Mahanoy Area Sch. Dist. v. B. L. ex rel. Levy*, 141 S. Ct. 2038, 2046 (2021). Accordingly, even if the *Tinker* framework applied here as a general matter, UCF's policy, which reaches beyond the classroom, may well fall (at least in part) outside of it.

Finally, by its own terms, *Tinker*'s deferential standard doesn't apply to viewpoint-based restrictions like the one we confront here. The Court said there that "[i]n order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." 393 U.S. at 509. The Supreme Court has consistently held that the government may not regulate on the basis of viewpoint even within a category of otherwise proscribable speech. *See, e.g.*, *R.A.V.*, 505 U.S. at 383–390 (explaining that even if some categories of speech are unprotected by the First Amendment, the government may not regulate within an excluded category based on the viewpoint expressed). So even if UCF could (per *Tinker*) restrict harassing speech that disrupts the school's functions, it couldn't do so, as it has here, based on the viewpoint of that speech. Put simply, the University can't pick and choose which types of disruptive speech to prohibit.

(citations and internal quotations omitted). We have expressly held that "an ongoing violation of the First Amendment constitutes an irreparable injury." *FF Cosms.*, 866 F.3d at 1298. Second, on the balance of equities, we can see arguments going both ways: On the one hand, Speech First's members' free-speech rights will be impaired if they are silenced; on the other hand, the University (and other students) may have to tolerate some unprotected conduct. Finally, we think that the public-interest factor favors granting the injunction. As the Supreme Court has stated, "[t]he First Amendment, in particular, serves significant societal interests." *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776 (1978); *see also Democratic Exec. Comm. Of Fla. v. Lee*, 915 F.3d 1312, 1327 (11th Cir. 2019) ("[T]he public interest is served when constitutional rights are protected."). Although the First Amendment sometimes allows hurtful expression, that's a cost that "We the People" have accepted as necessary to protect free-speech interests more generally. *See Otto*, 981 F.3d at 864 ("The First Amendment exists precisely so that speakers with unpopular ideas do not have to lobby the government for permission before they speak.").

* * *

After considering each of the four factors—and in deference to the first and second as the most significant—we hold that Speech First is entitled to an injunction of the discriminatory-harassment policy.

B

Because it found (erroneously, we conclude) that Speech First lacked standing to challenge the bias-related-incidents policy, the district court never considered that policy on the merits. Accordingly, we remand to the district court to decide in the first instance whether the chill caused by the bias-related-incidents policy is substantial enough to violate the First Amendment. *See Callahan v. U.S. Dep't of Health & Human Servs.*, 939 F.3d 1251, 1266 (11th Cir. 2019) ("We are, after all, a court of review, not a court of first view."). Relatedly, we leave it to the district court to determine in the first instance whether and to what extent the objective chill that gives Speech First Article III standing, *see supra* at 23–28, likewise establishes its claim on the merits.

IV

Nowhere is free speech more important than in our leading institutions of higher learning. Colleges and universities serve as the founts of—and the testing grounds for—new ideas. Their chief mission is to equip students to examine arguments critically and, perhaps even more importantly, to prepare young citizens to participate in the civic and political life of our democratic republic. It's hardly surprising, then, that the Supreme Court has "long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003); *see also Healy*, 408 U.S. at 180 ("The college classroom with

its surrounding environs is peculiarly the 'marketplace of ideas.'"); *Sweezy v. State of N.H. by Wyman*, 354 U.S. 234, 262 (1957) (Frankfurter, J., concurring) (emphasizing that a "free society" depends "on free universities"). Accordingly, it is imperative that colleges and universities toe the constitutional line when monitoring, supervising, and regulating student expression. Despite what we presume to be the very best of intentions, it seems to us substantially likely that the University of Central Florida crossed that line here.

* * *

For the foregoing reasons, we hold (1) that Speech First has standing to challenge both the discriminatory-harassment and bias-related-incidents policies, (2) that the district court abused its discretion in refusing to preliminarily enjoin the discriminatory-harassment policy, and (3) that the district court should determine in the first instance whether Speech First is entitled to a preliminary injunction of the bias-related-incidents policy.

**REVERSED** in part, **VACATED** in part, and **REMANDED**.

MARCUS, Circuit Judge, concurring:

I join fully in Judge Newsom's opinion for this Court. The University of Central Florida's discriminatory-harassment policy almost surely violates the First Amendment. It is grievously overbroad, and it is a content- and viewpoint-based restraint on free speech.

I write separately to underscore the grave peril posed by a policy that effectively polices adherence to intellectual dogma. History provides us with ample warning of those times and places when colleges and universities have stopped pursuing truth and have instead turned themselves into cathedrals for the worship of certain dogma. By depriving itself of academic institutions that pursue truth over any other concern, a society risks falling into the abyss of ignorance. Humans are not smart enough to have ideas that lie beyond challenge and debate. A discriminatory-harassment policy that assumes the most popular idea or the idea that least "interferes with, limits, deprives, or alters the terms or conditions of education" is the correct one is plainly at odds with the First Amendment and our notion of free speech.

It is in a university setting, perhaps above all others, that our foundational ideas must be subject to examination and re-examination. The process is not necessarily gentle or even cordial, but it cannot be cut off because sometimes it is unpleasant or provocative or exasperating. "Education should not be intended to make people comfortable, it is meant to make them think. Universities

should be expected to provide the conditions within which hard thought, and therefore strong disagreement, independent judgment, and the questioning of stubborn assumptions, can flourish in an environment of the greatest freedom." Report of the Committee on Freedom of Expression, UNIV. OF CHICAGO (2015) (quoting President Hanna Holborn Gray).

The University's discriminatory-harassment policy touches on every conceivable topic that may come up on a college campus. Religion, political affiliation, ethnicity, national origin, age, gender identity or expression, and genetic information are just a select few targeted by the policy. The specter of punishment for expressing unorthodox views on these topics stifles rigorous intellectual debate. And the harm is not limited to professors and students while they are on campus. Our future civic and scientific leaders surely will take these values with them after graduation. See Maj. Op. at 37-38.

A university that has placed its highest premium on the protection of feelings or safe intellectual space has abandoned its core mission. The protection of feelings or the creation of safe space rightly might be the foremost goal in some settings, like at a family dinner, but it is not right for a university. Its unambiguous mission must remain the pursuit of truth. John Stuart Mill put it best in his classic work, On Liberty:

> The peculiar evil of silencing the expression of an opinion is that it is robbing the human race; posterity as well as the existing generation; those who dissent

> from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth produced by its collision with error.
>
> JOHN STUART MILL, ON LIBERTY 19 (1859).

A university that turns itself into an asylum from controversy has ceased to be a university; it has just become an asylum.

STORY, District Judge, concurring:

I concur in the opinion of the Court but write separately to make clear that the opinion does not prohibit a university from establishing a program that provides students an opportunity to engage in civil discussions concerning differing viewpoints.[1] "Colleges and universities unquestionably benefit from the flow of ideas, debate, and deliberation on campus. These institutions should strive to foster an environment where critical thoughts, and sometimes strong disagreement, can flourish." *Speech First, Inc. v. Killeen*, 968 F.3d 628, 632 (7th Cir. 2020) (citation and quotations omitted). The only restriction placed on such programs by today's decision is an important one. The program may not be designed in such a way as to chill First Amendment rights. Insisting on compliance with the First Amendment should not prevent universities from exploring ways to lower the temperature on debate and help their students learn how to listen to and understand opposing viewpoints. As acknowledged by Speech First, the creation of such programs without running afoul of the First Amendment is possible. Oral Arg. at 54:08-55:49; Appellant Reply Br. at 16-17.

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[1] I do not mean to delve too deeply into the merits of the claim based on the bias-related-incidents policy. I recognize that as a court of review, it is not for us to decide this issue in the first instance. However, as it has been suggested the district court may determine that "the objective chill that gives Speech First Article III standing, likewise establishes its claim on the merits," I offer these observations.

# TINKER ET AL. *v.* DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 21. Argued November 12, 1968.—Decided February 24, 1969.

Petitioners, three public school pupils in Des Moines, Iowa, were suspended from school for wearing black armbands to protest the Government's policy in Vietnam. They sought nominal damages and an injunction against a regulation that the respondents had promulgated banning the wearing of armbands. The District Court dismissed the complaint on the ground that the regulation was within the Board's power, despite the absence of any finding of substantial interference with the conduct of school activities. The Court of Appeals, sitting *en banc,* affirmed by an equally divided court. *Held:*

1. In wearing armbands, the petitioners were quiet and passive. They were not disruptive and did not impinge upon the rights of others. In these circumstances, their conduct was within the protection of the Free Speech Clause of the First Amendment and the Due Process Clause of the Fourteenth. Pp. 505–506.

2. First Amendment rights are available to teachers and students, subject to application in light of the special characteristics of the school environment. Pp. 506–507.

3. A prohibition against expression of opinion, without any evidence that the rule is necessary to avoid substantial interference with school discipline or the rights of others, is not permissible under the First and Fourteenth Amendments. Pp. 507–514.

383 F. 2d 988, reversed and remanded.

*Dan L. Johnston* argued the cause for petitioners. With him on the brief were *Melvin L. Wulf* and *David N. Ellenhorn.*

*Allan A. Herrick* argued the cause for respondents. With him on the brief were *Herschel G. Langdon* and *David W. Belin.*

*Charles Morgan, Jr.,* filed a brief for the United States National Student Association, as *amicus curiae,* urging reversal.

MR. JUSTICE FORTAS delivered the opinion of the Court.

Petitioner John F. Tinker, 15 years old, and petitioner Christopher Eckhardt, 16 years old, attended high schools in Des Moines, Iowa. Petitioner Mary Beth Tinker, John's sister, was a 13-year-old student in junior high school.

In December 1965, a group of adults and students in Des Moines held a meeting at the Eckhardt home. The group determined to publicize their objections to the hostilities in Vietnam and their support for a truce by wearing black armbands during the holiday season and by fasting on December 16 and New Year's Eve. Petitioners and their parents had previously engaged in similar activities, and they decided to participate in the program.

The principals of the Des Moines schools became aware of the plan to wear armbands. On December 14, 1965, they met and adopted a policy that any student wearing an armband to school would be asked to remove it, and if he refused he would be suspended until he returned without the armband. Petitioners were aware of the regulation that the school authorities adopted.

On December 16, Mary Beth and Christopher wore black armbands to their schools. John Tinker wore his armband the next day. They were all sent home and suspended from school until they would come back without their armbands. They did not return to school until after the planned period for wearing armbands had expired—that is, until after New Year's Day.

This complaint was filed in the United States District Court by petitioners, through their fathers, under § 1983 of Title 42 of the United States Code. It prayed for an injunction restraining the respondent school officials and the respondent members of the board of directors of the school district from disciplining the petitioners, and it sought nominal damages. After an evidentiary hearing the District Court dismissed the complaint. It up-

held the constitutionality of the school authorities' action on the ground that it was reasonable in order to prevent disturbance of school discipline. 258 F. Supp. 971 (1966). The court referred to but expressly declined to follow the Fifth Circuit's holding in a similar case that the wearing of symbols like the armbands cannot be prohibited unless it "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school." *Burnside* v. *Byars,* 363 F. 2d 744, 749 (1966).[1]

On appeal, the Court of Appeals for the Eighth Circuit considered the case *en banc.* The court was equally divided, and the District Court's decision was accordingly affirmed, without opinion. 383 F. 2d 988 (1967). We granted certiorari. 390 U. S. 942 (1968).

## I.

The District Court recognized that the wearing of an armband for the purpose of expressing certain views is the type of symbolic act that is within the Free Speech Clause of the First Amendment. See *West Virginia* v. *Barnette,* 319 U. S. 624 (1943); *Stromberg* v. *California,* 283 U. S. 359 (1931). Cf. *Thornhill* v. *Alabama,* 310 U. S. 88 (1940); *Edwards* v. *South Carolina,* 372 U. S. 229 (1963); *Brown* v. *Louisiana,* 383 U. S. 131 (1966). As we shall discuss, the wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it. It was closely akin to "pure speech"

[1] In *Burnside,* the Fifth Circuit ordered that high school authorities be enjoined from enforcing a regulation forbidding students to wear "freedom buttons." It is instructive that in *Blackwell* v. *Issaquena County Board of Education,* 363 F. 2d 749 (1966), the same panel on the same day reached the opposite result on different facts. It declined to enjoin enforcement of such a regulation in another high school where the students wearing freedom buttons harassed students who did not wear them and created much disturbance.

which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment. Cf. *Cox* v. *Louisiana,* 379 U. S. 536, 555 (1965); *Adderley* v. *Florida,* 385 U. S. 39 (1966).

First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years. In *Meyer* v. *Nebraska,* 262 U. S. 390 (1923), and *Bartels* v. *Iowa,* 262 U. S. 404 (1923), this Court, in opinions by Mr. Justice McReynolds, held that the Due Process Clause of the Fourteenth Amendment prevents States from forbidding the teaching of a foreign language to young students. Statutes to this effect, the Court held, unconstitutionally interfere with the liberty of teacher, student, and parent.[2] See also *Pierce* v. *Society of Sisters,* 268

[2] *Hamilton* v. *Regents of Univ. of Cal.,* 293 U. S. 245 (1934), is sometimes cited for the broad proposition that the State may attach conditions to attendance at a state university that require individuals to violate their religious convictions. The case involved dismissal of members of a religious denomination from a land grant college for refusal to participate in military training. Narrowly viewed, the case turns upon the Court's conclusion that merely requiring a student to participate in school training in military "science" could not conflict with his constitutionally protected freedom of conscience. The decision cannot be taken as establishing that the State may impose and enforce any conditions that it chooses upon attendance at public institutions of learning, however violative they may be of fundamental constitutional guarantees. See, *e. g., West Virginia* v. *Barnette,* 319 U. S. 624 (1943); *Dixon* v. *Alabama State Board of Education,* 294 F. 2d 150 (C. A. 5th Cir. 1961); *Knight* v. *State Board of Education,* 200 F. Supp. 174 (D. C. M. D. Tenn. 1961); *Dickey* v. *Alabama State Board of Education,* 273 F. Supp. 613 (D. C. M. D. Ala. 1967). See also Note, Unconstitutional Conditions, 73 Harv. L. Rev. 1595 (1960); Note, Academic Freedom, 81 Harv. L. Rev. 1045 (1968).

U. S. 510 (1925); *West Virginia* v. *Barnette,* 319 U. S. 624 (1943); *McCollum* v. *Board of Education,* 333 U. S. 203 (1948); *Wieman* v. *Updegraff,* 344 U. S. 183, 195 (1952) (concurring opinion); *Sweezy* v. *New Hampshire,* 354 U. S. 234 (1957); *Shelton* v. *Tucker,* 364 U. S. 479, 487 (1960); *Engel* v. *Vitale,* 370 U. S. 421 (1962); *Keyishian* v. *Board of Regents,* 385 U. S. 589, 603 (1967); *Epperson* v. *Arkansas, ante,* p. 97 (1968).

In *West Virginia* v. *Barnette, supra,* this Court held that under the First Amendment, the student in public school may not be compelled to salute the flag. Speaking through Mr. Justice Jackson, the Court said:

> "The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." 319 U. S., at 637.

On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools. See *Epperson* v. *Arkansas, supra,* at 104; *Meyer* v. *Nebraska, supra,* at 402. Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities.

## II.

The problem posed by the present case does not relate to regulation of the length of skirts or the type of cloth-

ing, to hair style, or deportment. Cf. *Ferrell* v. *Dallas Independent School District,* 392 F. 2d 697 (1968); *Pugsley* v. *Sellmeyer,* 158 Ark. 247, 250 S. W. 538 (1923). It does not concern aggressive, disruptive action or even group demonstrations. Our problem involves direct, primary First Amendment rights akin to "pure speech."

The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students.

Only a few of the 18,000 students in the school system wore the black armbands. Only five students were suspended for wearing them. There is no indication that the work of the schools or any class was disrupted. Outside the classrooms, a few students made hostile remarks to the children wearing armbands, but there were no threats or acts of violence on school premises.

The District Court concluded that the action of the school authorities was reasonable because it was based upon their fear of a disturbance from the wearing of the armbands. But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, *Terminiello* v. *Chicago,* 337 U. S. 1 (1949); and our history says that it is this sort of hazardous freedom—this kind of openness—that is

the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained. *Burnside* v. *Byars, supra,* at 749.

In the present case, the District Court made no such finding, and our independent examination of the record fails to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students. Even an official memorandum prepared after the suspension that listed the reasons for the ban on wearing the armbands made no reference to the anticipation of such disruption.[3]

[3] The only suggestions of fear of disorder in the report are these:

"A former student of one of our high schools was killed in Viet Nam. Some of his friends are still in school and it was felt that if any kind of a demonstration existed, it might evolve into something which would be difficult to control."

"Students at one of the high schools were heard to say they would wear arm bands of other colors if the black bands prevailed."

Moreover, the testimony of school authorities at trial indicates that it was not fear of disruption that motivated the regulation prohibiting the armbands; the regulation was directed against "the principle of the demonstration" itself. School authorities simply felt that "the schools are no place for demonstrations," and if the students "didn't like the way our elected officials were handling things, it should be handled with the ballot box and not in the halls of our public schools."

On the contrary, the action of the school authorities appears to have been based upon an urgent wish to avoid the controversy which might result from the expression, even by the silent symbol of armbands, of opposition to this Nation's part in the conflagration in Vietnam.[4] It is revealing, in this respect, that the meeting at which the school principals decided to issue the contested regulation was called in response to a student's statement to the journalism teacher in one of the schools that he wanted to write an article on Vietnam and have it published in the school paper. (The student was dissuaded.[5])

It is also relevant that the school authorities did not purport to prohibit the wearing of all symbols of political or controversial significance. The record shows that students in some of the schools wore buttons relating to national political campaigns, and some even wore the Iron Cross, traditionally a symbol of Nazism. The order prohibiting the wearing of armbands did not extend to these. Instead, a particular symbol—black armbands worn to exhibit opposition to this Nation's involvement

[4] The District Court found that the school authorities, in prohibiting black armbands, were influenced by the fact that "[t]he Viet Nam war and the involvement of the United States therein has been the subject of a major controversy for some time. When the arm band regulation involved herein was promulgated, debate over the Viet Nam war had become vehement in many localities. A protest march against the war had been recently held in Washington, D. C. A wave of draft card burning incidents protesting the war had swept the country. At that time two highly publicized draft card burning cases were pending in this Court. Both individuals supporting the war and those opposing it were quite vocal in expressing their views." 258 F. Supp., at 972–973.

[5] After the principals' meeting, the director of secondary education and the principal of the high school informed the student that the principals were opposed to publication of his article. They reported that "we felt that it was a very friendly conversation, although we did not feel that we had convinced the student that our decision was a just one."

in Vietnam—was singled out for prohibition. Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views. As Judge Gewin, speaking for the Fifth Circuit, said, school officials cannot suppress "expressions of feelings with which they do not wish to contend." *Burnside* v. *Byars, supra,* at 749.

In *Meyer* v. *Nebraska, supra,* at 402, Mr. Justice McReynolds expressed this Nation's repudiation of the principle that a State might so conduct its schools as to "foster a homogeneous people." He said:

> "In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a

> State without doing violence to both letter and spirit of the Constitution."

This principle has been repeated by this Court on numerous occasions during the intervening years. In *Keyishian* v. *Board of Regents,* 385 U. S. 589, 603, MR. JUSTICE BRENNAN, speaking for the Court, said:

> " 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' *Shelton* v. *Tucker,* [364 U. S. 479,] at 487. The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.' "

The principle of these cases is not confined to the supervised and ordained discussion which takes place in the classroom. The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students.[6] This is not only an inevitable part of the process of attending school; it is also an important part of the educational process. A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on

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[6] In *Hammond* v. *South Carolina State College,* 272 F. Supp. 947 (D. C. S. C. 1967), District Judge Hemphill had before him a case involving a meeting on campus of 300 students to express their views on school practices. He pointed out that a school is not like a hospital or a jail enclosure. Cf. *Cox* v. *Louisiana,* 379 U. S. 536 (1965); *Adderley* v. *Florida,* 385 U. S. 39 (1966). It is a public place, and its dedication to specific uses does not imply that the constitutional rights of persons entitled to be there are to be gauged as if the premises were purely private property. Cf. *Edwards* v. *South Carolina,* 372 U. S. 229 (1963); *Brown* v. *Louisiana,* 383 U. S. 131 (1966).

the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without "materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school" and without colliding with the rights of others. *Burnside* v. *Byars, supra,* at 749. But conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech. Cf. *Blackwell* v. *Issaquena County Board of Education,* 363 F. 2d 749 (C. A. 5th Cir. 1966).

Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says. We properly read it to permit reasonable regulation of speech-connected activities in carefully restricted circumstances. But we do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom.

If a regulation were adopted by school officials forbidding discussion of the Vietnam conflict, or the expression by any student of opposition to it anywhere on school property except as part of a prescribed classroom exercise, it would be obvious that the regulation would violate the constitutional rights of students, at least if it could not be justified by a showing that the students' activities would materially and substantially disrupt the work and discipline of the school. Cf. *Ham-*

*mond* v. *South Carolina State College,* 272 F. Supp. 947 (D. C. S. C. 1967) (orderly protest meeting on state college campus); *Dickey* v. *Alabama State Board of Education,* 273 F. Supp. 613 (D. C. M. D. Ala. 1967) (expulsion of student editor of college newspaper). In the circumstances of the present case, the prohibition of the silent, passive "witness of the armbands," as one of the children called it, is no less offensive to the Constitution's guarantees.

As we have discussed, the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred. These petitioners merely went about their ordained rounds in school. Their deviation consisted only in wearing on their sleeve a band of black cloth, not more than two inches wide. They wore it to exhibit their disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example, to influence others to adopt them. They neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder. In the circumstances, our Constitution does not permit officials of the State to deny their form of expression.

We express no opinion as to the form of relief which should be granted, this being a matter for the lower courts to determine. We reverse and remand for further proceedings consistent with this opinion.

*Reversed and remanded.*

MR. JUSTICE STEWART, concurring.

Although I agree with much of what is said in the Court's opinion, and with its judgment in this case, I

cannot share the Court's uncritical assumption that, school discipline aside, the First Amendment rights of children are co-extensive with those of adults. Indeed, I had thought the Court decided otherwise just last Term in *Ginsberg* v. *New York,* 390 U. S. 629. I continue to hold the view I expressed in that case: "[A] State may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." *Id.,* at 649–650 (concurring in result). Cf. *Prince* v. *Massachusetts,* 321 U. S. 158.

MR. JUSTICE WHITE, concurring.

While I join the Court's opinion, I deem it appropriate to note, first, that the Court continues to recognize a distinction between communicating by words and communicating by acts or conduct which sufficiently impinges on some valid state interest; and, second, that I do not subscribe to everything the Court of Appeals said about free speech in its opinion in *Burnside* v. *Byars,* 363 F. 2d 744, 748 (C. A. 5th Cir. 1966), a case relied upon by the Court in the matter now before us.

MR. JUSTICE BLACK, dissenting.

The Court's holding in this case ushers in what I deem to be an entirely new era in which the power to control pupils by the elected "officials of state supported public schools . . ." in the United States is in ultimate effect transferred to the Supreme Court.[1] The Court brought

[1] The petition for certiorari here presented this single question: "Whether the First and Fourteenth Amendments permit officials of state supported public schools to prohibit students from wearing symbols of political views within school premises where the symbols are not disruptive of school discipline or decorum."

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this particular case here on a petition for certiorari urging that the First and Fourteenth Amendments protect the right of school pupils to express their political views all the way "from kindergarten through high school." Here the constitutional right to "political expression" asserted was a right to wear black armbands during school hours and at classes in order to demonstrate to the other students that the petitioners were mourning because of the death of United States soldiers in Vietnam and to protest that war which they were against. Ordered to refrain from wearing the armbands in school by the elected school officials and the teachers vested with state authority to do so, apparently only seven out of the school system's 18,000 pupils deliberately refused to obey the order. One defying pupil was Paul Tinker, 8 years old, who was in the second grade; another, Hope Tinker, was 11 years old and in the fifth grade; a third member of the Tinker family was 13, in the eighth grade; and a fourth member of the same family was John Tinker, 15 years old, an 11th grade high school pupil. Their father, a Methodist minister without a church, is paid a salary by the American Friends Service Committee. Another student who defied the school order and insisted on wearing an armband in school was Christopher Eckhardt, an 11th grade pupil and a petitioner in this case. His mother is an official in the Women's International League for Peace and Freedom.

As I read the Court's opinion it relies upon the following grounds for holding unconstitutional the judgment of the Des Moines school officials and the two courts below. First, the Court concludes that the wearing of armbands is "symbolic speech" which is "akin to 'pure speech' " and therefore protected by the First and Fourteenth Amendments. Secondly, the Court decides that the public schools are an appropriate place to exercise "symbolic speech" as long as normal school func-

tions are not "unreasonably" disrupted. Finally, the Court arrogates to itself, rather than to the State's elected officials charged with running the schools, the decision as to which school disciplinary regulations are "reasonable."

Assuming that the Court is correct in holding that the conduct of wearing armbands for the purpose of conveying political ideas is protected by the First Amendment, cf., *e. g., Giboney* v. *Empire Storage & Ice Co.,* 336 U. S. 490 (1949), the crucial remaining questions are whether students and teachers may use the schools at their whim as a platform for the exercise of free speech—"symbolic" or "pure"—and whether the courts will allocate to themselves the function of deciding how the pupils' school day will be spent. While I have always believed that under the First and Fourteenth Amendments neither the State nor the Federal Government has any authority to regulate or censor the content of speech, I have never believed that any person has a right to give speeches or engage in demonstrations where he pleases and when he pleases. This Court has already rejected such a notion. In *Cox* v. *Louisiana,* 379 U. S. 536, 554 (1965), for example, the Court clearly stated that the rights of free speech and assembly "do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time."

While the record does not show that any of these armband students shouted, used profane language, or were violent in any manner, detailed testimony by some of them shows their armbands caused comments, warnings by other students, the poking of fun at them, and a warning by an older football player that other, nonprotesting students had better let them alone. There is also evidence that a teacher of mathematics had his lesson period practically "wrecked" chiefly by disputes with Mary Beth Tinker, who wore her armband for her "demonstra-

tion." Even a casual reading of the record shows that this armband did divert students' minds from their regular lessons, and that talk, comments, etc., made John Tinker "self-conscious" in attending school with his armband. While the absence of obscene remarks or boisterous and loud disorder perhaps justifies the Court's statement that the few armband students did not actually "disrupt" the classwork, I think the record overwhelmingly shows that the armbands did exactly what the elected school officials and principals foresaw they would, that is, took the students' minds off their classwork and diverted them to thoughts about the highly emotional subject of the Vietnam war. And I repeat that if the time has come when pupils of state-supported schools, kindergartens, grammar schools, or high schools, can defy and flout orders of school officials to keep their minds on their own schoolwork, it is the beginning of a new revolutionary era of permissiveness in this country fostered by the judiciary. The next logical step, it appears to me, would be to hold unconstitutional laws that bar pupils under 21 or 18 from voting, or from being elected members of the boards of education.[2]

The United States District Court refused to hold that the state school order violated the First and Fourteenth Amendments. 258 F. Supp. 971. Holding that the protest was akin to speech, which is protected by the First

[2] The following Associated Press article appeared in the Washington Evening Star, January 11, 1969, p. A-2, col. 1:

"BELLINGHAM, Mass. (AP)—Todd R. Hennessy, 16, has filed nominating papers to run for town park commissioner in the March election.

" 'I can see nothing illegal in the youth's seeking the elective office,' said Lee Ambler, the town counsel. 'But I can't overlook the possibility that if he is elected any legal contract entered into by the park commissioner would be void because he is a juvenile.'

"Todd is a junior in Mount St. Charles Academy, where he has a top scholastic record."

and Fourteenth Amendments, that court held that the school order was "reasonable" and hence constitutional. There was at one time a line of cases holding "reasonableness" as the court saw it to be the test of a "due process" violation. Two cases upon which the Court today heavily relies for striking down this school order used this test of reasonableness, *Meyer* v. *Nebraska,* 262 U. S. 390 (1923), and *Bartels* v. *Iowa,* 262 U. S. 404 (1923). The opinions in both cases were written by Mr. Justice McReynolds; Mr. Justice Holmes, who opposed this reasonableness test, dissented from the holdings as did Mr. Justice Sutherland. This constitutional test of reasonableness prevailed in this Court for a season. It was this test that brought on President Franklin Roosevelt's well-known Court fight. His proposed legislation did not pass, but the fight left the "reasonableness" constitutional test dead on the battlefield, so much so that this Court in *Ferguson* v. *Skrupa,* 372 U. S. 726, 729, 730, after a thorough review of the old cases, was able to conclude in 1963:

> "There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy.
>
> . . . . .
>
> "The doctrine that prevailed in *Lochner, Coppage, Adkins, Burns,* and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded."

The *Ferguson* case totally repudiated the old reasonableness-due process test, the doctrine that judges have the power to hold laws unconstitutional upon the belief of judges that they "shock the conscience" or that they are

"unreasonable," "arbitrary," "irrational," "contrary to fundamental 'decency,' " or some other such flexible term without precise boundaries. I have many times expressed my opposition to that concept on the ground that it gives judges power to strike down any law they do not like. If the majority of the Court today, by agreeing to the opinion of my Brother FORTAS, is resurrecting that old reasonableness-due process test, I think the constitutional change should be plainly, unequivocally, and forthrightly stated for the benefit of the bench and bar. It will be a sad day for the country, I believe, when the present-day Court returns to the McReynolds due process concept. Other cases cited by the Court do not, as implied, follow the McReynolds reasonableness doctrine. *West Virginia* v. *Barnette,* 319 U. S. 624, clearly rejecting the "reasonableness" test, held that the Fourteenth Amendment made the First applicable to the States, and that the two forbade a State to *compel* little schoolchildren to salute the United States flag when they had religious scruples against doing so.[3] Neither *Thornhill* v. *Alabama,* 310 U. S. 88; *Stromberg* v. *California,* 283 U. S. 359; *Edwards*

[3] In *Cantwell* v. *Connecticut,* 310 U. S. 296, 303–304 (1940), this Court said:

"The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws. The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."

v. *South Carolina,* 372 U. S. 229; nor *Brown* v. *Louisiana,* 383 U. S. 131, related to schoolchildren at all, and none of these cases embraced Mr. Justice McReynolds' reasonableness test; and *Thornhill, Edwards,* and *Brown* relied on the vagueness of state statutes under scrutiny to hold them unconstitutional. *Cox* v. *Louisiana,* 379 U. S. 536, 555, and *Adderley* v. *Florida,* 385 U. S. 39, cited by the Court as a "compare," indicating, I suppose, that these two cases are no longer the law, were not rested to the slightest extent on the *Meyer* and *Bartels* "reasonableness-due process-McReynolds" constitutional test.

I deny, therefore, that it has been the "unmistakable holding of this Court for almost 50 years" that "students" and "teachers" take with them into the "schoolhouse gate" constitutional rights to "freedom of speech or expression." Even *Meyer* did not hold that. It makes no reference to "symbolic speech" at all; what it did was to strike down as "unreasonable" and therefore unconstitutional a Nebraska law barring the teaching of the German language before the children reached the eighth grade. One can well agree with Mr. Justice Holmes and Mr. Justice Sutherland, as I do, that such a law was no more unreasonable than it would be to bar the teaching of Latin and Greek to pupils who have not reached the eighth grade. In fact, I think the majority's reason for invalidating the Nebraska law was that it did not like it or in legal jargon that it "shocked the Court's conscience," "offended its sense of justice," or was "contrary to fundamental concepts of the English-speaking world," as the Court has sometimes said. See, *e. g., Rochin* v. *California,* 342 U. S. 165, and *Irvine* v. *California,* 347 U. S. 128. The truth is that a teacher of kindergarten, grammar school, or high school pupils no more carries into a school with him a complete right to freedom of speech and expression than an anti-Catholic or anti-Semite carries with him a complete freedom of

speech and religion into a Catholic church or Jewish synagogue. Nor does a person carry with him into the United States Senate or House, or into the Supreme Court, or any other court, a complete constitutional right to go into those places contrary to their rules and speak his mind on any subject he pleases. It is a myth to say that any person has a constitutional right to say what he pleases, where he pleases, and when he pleases. Our Court has decided precisely the opposite. See, *e. g.*, *Cox* v. *Louisiana,* 379 U. S. 536, 555; *Adderley* v. *Florida,* 385 U. S. 39.

In my view, teachers in state-controlled public schools are hired to teach there. Although Mr. Justice McReynolds may have intimated to the contrary in *Meyer* v. *Nebraska, supra,* certainly a teacher is not paid to go into school and teach subjects the State does not hire him to teach as a part of its selected curriculum. Nor are public school students sent to the schools at public expense to broadcast political or any other views to educate and inform the public. The original idea of schools, which I do not believe is yet abandoned as worthless or out of date, was that children had not yet reached the point of experience and wisdom which enabled them to teach all of their elders. It may be that the Nation has outworn the old-fashioned slogan that "children are to be seen not heard," but one may, I hope, be permitted to harbor the thought that taxpayers send children to school on the premise that at their age they need to learn, not teach.

The true principles on this whole subject were in my judgment spoken by Mr. Justice McKenna for the Court in *Waugh* v. *Mississippi University* in 237 U. S. 589, 596–597. The State had there passed a law barring students from peaceably assembling in Greek letter fraternities and providing that students who joined them could be expelled from school. This law would appear on the surface to run afoul of the First Amendment's

freedom of assembly clause. The law was attacked as violative of due process and of the privileges and immunities clause and as a deprivation of property and of liberty, under the Fourteenth Amendment. It was argued that the fraternity made its members more moral, taught discipline, and inspired its members to study harder and to obey better the rules of discipline and order. This Court rejected all the "fervid" pleas of the fraternities' advocates and decided unanimously against these Fourteenth Amendment arguments. The Court in its next to the last paragraph made this statement which has complete relevance for us today:

> "It is said that the fraternity to which complainant belongs is a moral and of itself a disciplinary force. This need not be denied. But whether such membership makes against discipline was for the State of Mississippi to determine. It is to be remembered that the University was established by the State and is under the control of the State, and the enactment of the statute may have been induced by the opinion that *membership in the prohibited societies divided the attention of the students and distracted from that singleness of purpose which the State desired to exist in its public educational institutions.* It is not for us to entertain conjectures in opposition to the views of the State and annul its regulations upon disputable considerations of their wisdom or necessity." (Emphasis supplied.)

It was on the foregoing argument that this Court sustained the power of Mississippi to curtail the First Amendment's right of peaceable assembly. And the same reasons are equally applicable to curtailing in the States' public schools the right to complete freedom of expression. Iowa's public schools, like Mississippi's university, are operated to give students an opportunity to learn, not to talk politics by actual speech, or by "sym-

bolic" speech. And, as I have pointed out before, the record amply shows that public protest in the school classes against the Vietnam war "distracted from that singleness of purpose which the State [here Iowa] desired to exist in its public educational institutions." Here the Court should accord Iowa educational institutions the same right to determine for themselves to what extent free expression should be allowed in its schools as it accorded Mississippi with reference to freedom of assembly. But even if the record were silent as to protests against the Vietnam war distracting students from their assigned class work, members of this Court, like all other citizens, know, without being told, that the disputes over the wisdom of the Vietnam war have disrupted and divided this country as few other issues ever have. Of course students, like other people, cannot concentrate on lesser issues when black armbands are being ostentatiously displayed in their presence to call attention to the wounded and dead of the war, some of the wounded and the dead being their friends and neighbors. It was, of course, to distract the attention of other students that some students insisted up to the very point of their own suspension from school that they were determined to sit in school with their symbolic armbands.

Change has been said to be truly the law of life but sometimes the old and the tried and true are worth holding. The schools of this Nation have undoubtedly contributed to giving us tranquility and to making us a more law-abiding people. Uncontrolled and uncontrollable liberty is an enemy to domestic peace. We cannot close our eyes to the fact that some of the country's greatest problems are crimes committed by the youth, too many of school age. School discipline, like parental discipline, is an integral and important part of training our children to be good citizens—to be better citizens. Here a very small number of students have crisply and sum-

marily refused to obey a school order designed to give pupils who want to learn the opportunity to do so. One does not need to be a prophet or the son of a prophet to know that after the Court's holding today some students in Iowa schools and indeed in all schools will be ready, able, and willing to defy their teachers on practically all orders. This is the more unfortunate for the schools since groups of students all over the land are already running loose, conducting break-ins, sit-ins, lie-ins, and smash-ins. Many of these student groups, as is all too familiar to all who read the newspapers and watch the television news programs, have already engaged in rioting, property seizures, and destruction. They have picketed schools to force students not to cross their picket lines and have too often violently attacked earnest but frightened students who wanted an education that the pickets did not want them to get. Students engaged in such activities are apparently confident that they know far more about how to operate public school systems than do their parents, teachers, and elected school officials. It is no answer to say that the particular students here have not yet reached such high points in their demands to attend classes in order to exercise their political pressures. Turned loose with lawsuits for damages and injunctions against their teachers as they are here, it is nothing but wishful thinking to imagine that young, immature students will not soon believe it is their right to control the schools rather than the right of the States that collect the taxes to hire the teachers for the benefit of the pupils. This case, therefore, wholly without constitutional reasons in my judgment, subjects all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students. I, for one, am not fully persuaded that school pupils are wise enough, even with this Court's expert help from Washington, to run the 23,390 public school

systems[4] in our 50 States. I wish, therefore, wholly to disclaim any purpose on my part to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students. I dissent.

MR. JUSTICE HARLAN, dissenting.

I certainly agree that state public school authorities in the discharge of their responsibilities are not wholly exempt from the requirements of the Fourteenth Amendment respecting the freedoms of expression and association. At the same time I am reluctant to believe that there is any disagreement between the majority and myself on the proposition that school officials should be accorded the widest authority in maintaining discipline and good order in their institutions. To translate that proposition into a workable constitutional rule, I would, in cases like this, cast upon those complaining the burden of showing that a particular school measure was motivated by other than legitimate school concerns—for example, a desire to prohibit the expression of an unpopular point of view, while permitting expression of the dominant opinion.

Finding nothing in this record which impugns the good faith of respondents in promulgating the armband regulation, I would affirm the judgment below.

[4] Statistical Abstract of the United States (1968), Table No. 578, p. 406.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

# SUPREME COURT OF THE UNITED STATES

Syllabus

## UNITED STATES *v.* JONES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10–1259. Argued November 8, 2011—Decided January 23, 2012

The Government obtained a search warrant permitting it to install a Global-Positioning-System (GPS) tracking device on a vehicle registered to respondent Jones's wife. The warrant authorized installation in the District of Columbia and within 10 days, but agents installed the device on the 11th day and in Maryland. The Government then tracked the vehicle's movements for 28 days. It subsequently secured an indictment of Jones and others on drug trafficking conspiracy charges. The District Court suppressed the GPS data obtained while the vehicle was parked at Jones's residence, but held the remaining data admissible because Jones had no reasonable expectation of privacy when the vehicle was on public streets. Jones was convicted. The D. C. Circuit reversed, concluding that admission of the evidence obtained by warrantless use of the GPS device violated the Fourth Amendment.

*Held:* The Government's attachment of the GPS device to the vehicle, and its use of that device to monitor the vehicle's movements, constitutes a search under the Fourth Amendment. Pp. 3–12.

(a) The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Here, the Government's physical intrusion on an "effect" for the purpose of obtaining information constitutes a "search." This type of encroachment on an area enumerated in the Amendment would have been considered a search within the meaning of the Amendment at the time it was adopted. Pp. 3–4.

(b) This conclusion is consistent with this Court's Fourth Amendment jurisprudence, which until the latter half of the 20th century was tied to common-law trespass. Later cases, which have deviated from that exclusively property-based approach, have applied the

Syllabus

analysis of Justice Harlan's concurrence in *Katz* v. *United States*, 389 U. S. 347, which said that the Fourth Amendment protects a person's "reasonable expectation of privacy," *id.*, at 360. Here, the Court need not address the Government's contention that Jones had no "reasonable expectation of privacy," because Jones's Fourth Amendment rights do not rise or fall with the *Katz* formulation. At bottom, the Court must "assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Kyllo* v. *United States*, 533 U. S. 27, 34. *Katz* did not repudiate the understanding that the Fourth Amendment embodies a particular concern for government trespass upon the areas it enumerates. The *Katz* reasonable-expectation-of-privacy test has been added to, but not substituted for, the common-law trespassory test. See *Alderman* v. *United States*, 394 U. S. 165, 176; *Soldal* v. *Cook County*, 506 U. S. 56, 64. *United States* v. *Knotts*, 460 U. S. 276, and *United States* v. *Karo*, 468 U. S. 705—post-*Katz* cases rejecting Fourth Amendment challenges to "beepers," electronic tracking devices representing another form of electronic monitoring—do not foreclose the conclusion that a search occurred here. *New York* v. *Class*, 475 U. S. 106, and *Oliver* v. *United States*, 466 U. S. 170, also do not support the Government's position. Pp. 4–12.

(c) The Government's alternative argument—that if the attachment and use of the device was a search, it was a reasonable one—is forfeited because it was not raised below. P. 12.

615 F. 3d 544, affirmed.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, and SOTOMAYOR, JJ., joined. SOTOMAYOR, J., filed a concurring opinion. ALITO, J., filed an opinion concurring in the judgment, in which GINSBURG, BREYER, and KAGAN, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

# SUPREME COURT OF THE UNITED STATES

No. 10–1259

UNITED STATES, PETITIONER *v.* ANTOINE JONES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[January 23, 2012]

JUSTICE SCALIA delivered the opinion of the Court.

We decide whether the attachment of a Global-Positioning-System (GPS) tracking device to an individual's vehicle, and subsequent use of that device to monitor the vehicle's movements on public streets, constitutes a search or seizure within the meaning of the Fourth Amendment.

## I

In 2004 respondent Antoine Jones, owner and operator of a nightclub in the District of Columbia, came under suspicion of trafficking in narcotics and was made the target of an investigation by a joint FBI and Metropolitan Police Department task force. Officers employed various investigative techniques, including visual surveillance of the nightclub, installation of a camera focused on the front door of the club, and a pen register and wiretap covering Jones's cellular phone.

Based in part on information gathered from these sources, in 2005 the Government applied to the United States District Court for the District of Columbia for a warrant authorizing the use of an electronic tracking device on the Jeep Grand Cherokee registered to Jones's

wife. A warrant issued, authorizing installation of the device in the District of Columbia and within 10 days.

On the 11th day, and not in the District of Columbia but in Maryland,[1] agents installed a GPS tracking device on the undercarriage of the Jeep while it was parked in a public parking lot. Over the next 28 days, the Government used the device to track the vehicle's movements, and once had to replace the device's battery when the vehicle was parked in a different public lot in Maryland. By means of signals from multiple satellites, the device established the vehicle's location within 50 to 100 feet, and communicated that location by cellular phone to a Government computer. It relayed more than 2,000 pages of data over the 4-week period.

The Government ultimately obtained a multiple-count indictment charging Jones and several alleged co-conspirators with, as relevant here, conspiracy to distribute and possess with intent to distribute five kilograms or more of cocaine and 50 grams or more of cocaine base, in violation of 21 U. S. C. §§841 and 846. Before trial, Jones filed a motion to suppress evidence obtained through the GPS device. The District Court granted the motion only in part, suppressing the data obtained while the vehicle was parked in the garage adjoining Jones's residence. 451 F. Supp. 2d 71, 88 (2006). It held the remaining data admissible, because "'[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.'" *Ibid.* (quoting *United States* v. *Knotts*, 460 U. S. 276, 281 (1983)). Jones's trial in October 2006 produced a hung jury on the conspiracy count.

In March 2007, a grand jury returned another indict-

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[1] In this litigation, the Government has conceded noncompliance with the warrant and has argued only that a warrant was not required. *United States* v. *Maynard*, 615 F. 3d 544, 566, n. (CADC 2010).

ment, charging Jones and others with the same conspiracy. The Government introduced at trial the same GPS-derived locational data admitted in the first trial, which connected Jones to the alleged conspirators' stash house that contained $850,000 in cash, 97 kilograms of cocaine, and 1 kilogram of cocaine base. The jury returned a guilty verdict, and the District Court sentenced Jones to life imprisonment.

The United States Court of Appeals for the District of Columbia Circuit reversed the conviction because of admission of the evidence obtained by warrantless use of the GPS device which, it said, violated the Fourth Amendment. *United States* v. *Maynard*, 615 F. 3d 544 (2010). The D. C. Circuit denied the Government's petition for rehearing en banc, with four judges dissenting. 625 F. 3d 766 (2010). We granted certiorari, 564 U. S. ___ (2011).

## II

## A

The Fourth Amendment provides in relevant part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." It is beyond dispute that a vehicle is an "effect" as that term is used in the Amendment. *United States* v. *Chadwick*, 433 U. S. 1, 12 (1977). We hold that the Government's installation of a GPS device on a target's vehicle,[2] and its use of that device to monitor the vehicle's movements, constitutes a "search."

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[2] As we have noted, the Jeep was registered to Jones's wife. The Government acknowledged, however, that Jones was "the exclusive driver." *Id.*, at 555, n. (internal quotation marks omitted). If Jones was not the owner he had at least the property rights of a bailee. The Court of Appeals concluded that the vehicle's registration did not affect his ability to make a Fourth Amendment objection, *ibid.*, and the Government has not challenged that determination here. We therefore do not consider the Fourth Amendment significance of Jones's status.

It is important to be clear about what occurred in this case: The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a "search" within the meaning of the Fourth Amendment when it was adopted. *Entick* v. *Carrington*, 95 Eng. Rep. 807 (C. P. 1765), is a "case we have described as a 'monument of English freedom' 'undoubtedly familiar' to 'every American statesman' at the time the Constitution was adopted, and considered to be 'the true and ultimate expression of constitutional law'" with regard to search and seizure. *Brower* v. *County of Inyo*, 489 U. S. 593, 596 (1989) (quoting *Boyd* v. *United States*, 116 U. S. 616, 626 (1886)). In that case, Lord Camden expressed in plain terms the significance of property rights in search-and-seizure analysis:

> "[O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law." *Entick, supra,* at 817.

The text of the Fourth Amendment reflects its close connection to property, since otherwise it would have referred simply to "the right of the people to be secure against unreasonable searches and seizures"; the phrase "in their persons, houses, papers, and effects" would have been superfluous.

Consistent with this understanding, our Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century. *Kyllo* v. *United States*, 533 U. S. 27, 31 (2001); Kerr, The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution, 102 Mich. L. Rev. 801, 816 (2004). Thus, in *Olmstead* v. *United States*, 277 U. S.

438 (1928), we held that wiretaps attached to telephone wires on the public streets did not constitute a Fourth Amendment search because "[t]here was no entry of the houses or offices of the defendants," *id.*, at 464.

Our later cases, of course, have deviated from that exclusively property-based approach. In *Katz* v. *United States*, 389 U. S. 347, 351 (1967), we said that "the Fourth Amendment protects people, not places," and found a violation in attachment of an eavesdropping device to a public telephone booth. Our later cases have applied the analysis of Justice Harlan's concurrence in that case, which said that a violation occurs when government officers violate a person's "reasonable expectation of privacy," *id.*, at 360. See, *e.g.*, *Bond* v. *United States*, 529 U. S. 334 (2000); *California* v. *Ciraolo*, 476 U. S. 207 (1986); *Smith* v. *Maryland*, 442 U. S. 735 (1979).

The Government contends that the Harlan standard shows that no search occurred here, since Jones had no "reasonable expectation of privacy" in the area of the Jeep accessed by Government agents (its underbody) and in the locations of the Jeep on the public roads, which were visible to all. But we need not address the Government's contentions, because Jones's Fourth Amendment rights do not rise or fall with the *Katz* formulation. At bottom, we must "assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Kyllo*, *supra*, at 34. As explained, for most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ("persons, houses, papers, and effects") it enumerates.[3] *Katz* did not repudiate

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[3]JUSTICE ALITO's concurrence (hereinafter concurrence) doubts the wisdom of our approach because "it is almost impossible to think of late-18th-century situations that are analogous to what took place in this case." *Post*, at 3 (opinion concurring in judgment). But in fact it posits a situation that is not far afield—a constable's concealing himself

that understanding. Less than two years later the Court upheld defendants' contention that the Government could not introduce against them conversations between *other* people obtained by warrantless placement of electronic surveillance devices in their homes. The opinion rejected the dissent's contention that there was no Fourth Amendment violation "unless the conversational privacy of the homeowner himself is invaded."[4] *Alderman* v. *United States*, 394 U. S. 165, 176 (1969). "[W]e [do not] believe that *Katz*, by holding that the Fourth Amendment protects persons and their private conversations, was intended to withdraw any of the protection which the Amendment extends to the home . . . ." *Id.*, at 180.

More recently, in *Soldal* v. *Cook County*, 506 U. S. 56 (1992), the Court unanimously rejected the argument that although a "seizure" had occurred "in a 'technical' sense" when a trailer home was forcibly removed, *id.*, at 62, no Fourth Amendment violation occurred because law enforcement had not "invade[d] the [individuals'] privacy," *id.*, at 60. *Katz*, the Court explained, established that "property rights are not the sole measure of Fourth

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in the target's coach in order to track its movements. *Ibid.* There is no doubt that the information gained by that trespassory activity would be the product of an unlawful search—whether that information consisted of the conversations occurring in the coach, or of the destinations to which the coach traveled.

In any case, it is quite irrelevant whether there was an 18th-century analog. Whatever new methods of investigation may be devised, our task, *at a minimum*, is to decide whether the action in question would have constituted a "search" within the original meaning of the Fourth Amendment. Where, as here, the Government obtains information by physically intruding on a constitutionally protected area, such a search has undoubtedly occurred.

[4] Thus, the concurrence's attempt to recast *Alderman* as meaning that individuals have a "legitimate expectation of privacy in all conversations that [take] place under their roof," *post*, at 6–7, is foreclosed by the Court's opinion. The Court took as a given that the homeowner's "conversational privacy" had not been violated.

Amendment violations," but did not "snuf[f] out the previously recognized protection for property." 506 U. S., at 64. As Justice Brennan explained in his concurrence in *Knotts*, *Katz* did not erode the principle "that, when the Government *does* engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment." 460 U. S., at 286 (opinion concurring in judgment). We have embodied that preservation of past rights in our very definition of "reasonable expectation of privacy" which we have said to be an expectation "that has a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Minnesota* v. *Carter*, 525 U. S. 83, 88 (1998) (internal quotation marks omitted). *Katz* did not narrow the Fourth Amendment's scope.[5]

The Government contends that several of our post-*Katz* cases foreclose the conclusion that what occurred here constituted a search. It relies principally on two cases in

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[5]The concurrence notes that post-*Katz* we have explained that "'an actual trespass is neither necessary *nor sufficient* to establish a constitutional violation.'" *Post*, at 6 (quoting *United States* v. *Karo*, 468 U. S. 705, 713 (1984)). That is undoubtedly true, and undoubtedly irrelevant. *Karo* was considering whether a seizure occurred, and as the concurrence explains, a seizure of property occurs, not when there is a trespass, but "when there is some meaningful interference with an individual's possessory interests in that property." *Post*, at 2 (internal quotation marks omitted). Likewise with a search. Trespass alone does not qualify, but there must be conjoined with that what was present here: an attempt to find something or to obtain information.

Related to this, and similarly irrelevant, is the concurrence's point that, if analyzed separately, neither the installation of the device nor its use would constitute a Fourth Amendment search. See *ibid.* Of course not. A trespass on "houses" or "effects," or a *Katz* invasion of privacy, is not alone a search unless it is done to obtain information; and the obtaining of information is not alone a search unless it is achieved by such a trespass or invasion of privacy.

which we rejected Fourth Amendment challenges to "beepers," electronic tracking devices that represent another form of electronic monitoring. The first case, *Knotts*, upheld against Fourth Amendment challenge the use of a "beeper" that had been placed in a container of chloroform, allowing law enforcement to monitor the location of the container. 460 U. S., at 278. We said that there had been no infringement of Knotts' reasonable expectation of privacy since the information obtained—the location of the automobile carrying the container on public roads, and the location of the off-loaded container in open fields near Knotts' cabin—had been voluntarily conveyed to the public.[6] *Id.*, at 281–282. But as we have discussed, the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test. The holding in *Knotts* addressed only the former, since the latter was not at issue. The beeper had been placed in the container before it came into Knotts' possession, with the consent of the then-owner. 460 U. S., at 278. Knotts did not challenge that installation, and we specifically declined to consider its effect on the Fourth Amendment analysis. *Id.*, at 279, n. *Knotts* would be relevant, perhaps, if the Government were making the argument that what would otherwise be an unconstitutional search is not such where it produces only public information. The Government does not make that argument, and we know of no case that would support it.

The second "beeper" case, *United States* v. *Karo*, 468 U. S. 705 (1984), does not suggest a different conclusion. There we addressed the question left open by *Knotts*, whether the installation of a beeper in a container

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[6] *Knotts* noted the "limited use which the government made of the signals from this particular beeper," 460 U. S., at 284; and reserved the question whether "different constitutional principles may be applicable" to "dragnet-type law enforcement practices" of the type that GPS tracking made possible here, *ibid.*

amounted to a search or seizure. 468 U. S., at 713. As in *Knotts*, at the time the beeper was installed the container belonged to a third party, and it did not come into possession of the defendant until later. 468 U. S., at 708. Thus, the specific question we considered was whether the installation "*with the consent of the original owner* constitute[d] a search or seizure . . . when the container is delivered to a buyer having no knowledge of the presence of the beeper." *Id.*, at 707 (emphasis added). We held not. The Government, we said, came into physical contact with the container only before it belonged to the defendant Karo; and the transfer of the container with the unmonitored beeper inside did not convey any information and thus did not invade Karo's privacy. See *id.*, at 712. That conclusion is perfectly consistent with the one we reach here. Karo accepted the container as it came to him, beeper and all, and was therefore not entitled to object to the beeper's presence, even though it was used to monitor the container's location. Cf. *On Lee* v. *United States*, 343 U. S. 747, 751–752 (1952) (no search or seizure where an informant, who was wearing a concealed microphone, was invited into the defendant's business). Jones, who possessed the Jeep at the time the Government trespassorily inserted the information-gathering device, is on much different footing.

The Government also points to our exposition in *New York* v. *Class*, 475 U. S. 106 (1986), that "[t]he exterior of a car . . . is thrust into the public eye, and thus to examine it does not constitute a 'search.'" *Id.*, at 114. That statement is of marginal relevance here since, as the Government acknowledges, "the officers in this case did *more* than conduct a visual inspection of respondent's vehicle," Brief for United States 41 (emphasis added). By attaching the device to the Jeep, officers encroached on a protected area. In *Class* itself we suggested that this would make a difference, for we concluded that an officer's momentary reaching into the interior of a vehicle did constitute a

search.[7] 475 U. S., at 114–115.

Finally, the Government's position gains little support from our conclusion in *Oliver* v. *United States*, 466 U. S. 170 (1984), that officers' information-gathering intrusion on an "open field" did not constitute a Fourth Amendment search even though it was a trespass at common law, *id.*, at 183. Quite simply, an open field, unlike the curtilage of a home, see *United States* v. *Dunn*, 480 U. S. 294, 300 (1987), is not one of those protected areas enumerated in the Fourth Amendment. *Oliver, supra*, at 176–177. See also *Hester* v. *United States*, 265 U. S. 57, 59 (1924). The Government's physical intrusion on such an area—unlike its intrusion on the "effect" at issue here—is of no Fourth Amendment significance.[8]

B

The concurrence begins by accusing us of applying "18th-century tort law." *Post*, at 1. That is a distortion. What we apply is an 18th-century guarantee against unreasonable searches, which we believe must provide *at*

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[7]The Government also points to *Cardwell* v. *Lewis*, 417 U. S. 583 (1974), in which the Court rejected the claim that the inspection of an impounded vehicle's tire tread and the collection of paint scrapings from its exterior violated the Fourth Amendment. Whether the plurality said so because no search occurred or because the search was reasonable is unclear. Compare *id.*, at 591 (opinion of Blackmun, J.) ("[W]e fail to comprehend what expectation of privacy was infringed"), with *id.*, at 592 ("Under circumstances such as these, where probable cause exists, a warrantless examination of the exterior of a car is not unreasonable . . . ").

[8]Thus, our theory is *not* that the Fourth Amendment is concerned with "*any* technical trespass that led to the gathering of evidence." *Post*, at 3 (ALITO, J., concurring in judgment) (emphasis added). The Fourth Amendment protects against trespassory searches only with regard to those items ("persons, houses, papers, and effects") that it enumerates. The trespass that occurred in *Oliver* may properly be understood as a "search," but not one "in the constitutional sense." 466 U. S., at 170, 183.

*a minimum* the degree of protection it afforded when it was adopted. The concurrence does not share that belief. It would apply *exclusively Katz*'s reasonable-expectation-of-privacy test, even when that eliminates rights that previously existed.

The concurrence faults our approach for "present[ing] particularly vexing problems" in cases that do not involve physical contact, such as those that involve the transmission of electronic signals. *Post*, at 9. We entirely fail to understand that point. For unlike the concurrence, which would make *Katz* the *exclusive* test, we do not make trespass the exclusive test. Situations involving merely the transmission of electronic signals without trespass would *remain* subject to *Katz* analysis.

In fact, it is the concurrence's insistence on the exclusivity of the *Katz* test that needlessly leads us into "particularly vexing problems" in the present case. This Court has to date not deviated from the understanding that mere visual observation does not constitute a search. See *Kyllo*, 533 U. S., at 31–32. We accordingly held in *Knotts* that "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." 460 U. S., at 281. Thus, even assuming that the concurrence is correct to say that "[t]raditional surveillance" of Jones for a 4-week period "would have required a large team of agents, multiple vehicles, and perhaps aerial assistance," *post*, at 12, our cases suggest that such visual observation is constitutionally permissible. It may be that achieving the same result through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy, but the present case does not require us to answer that question.

And answering it affirmatively leads us needlessly into additional thorny problems. The concurrence posits that "relatively short-term monitoring of a person's movements

on public streets" is okay, but that "the use of longer term GPS monitoring in investigations *of most offenses*" is no good. *Post*, at 13 (emphasis added). That introduces yet another novelty into our jurisprudence. There is no precedent for the proposition that whether a search has occurred depends on the nature of the crime being investigated. And even accepting that novelty, it remains unexplained why a 4-week investigation is "surely" too long and why a drug-trafficking conspiracy involving substantial amounts of cash and narcotics is not an "extraordinary offens[e]" which may permit longer observation. See *post*, at 13–14. What of a 2-day monitoring of a suspected purveyor of stolen electronics? Or of a 6-month monitoring of a suspected terrorist? We may have to grapple with these "vexing problems" in some future case where a classic trespassory search is not involved and resort must be had to *Katz* analysis; but there is no reason for rushing forward to resolve them here.

III

The Government argues in the alternative that even if the attachment and use of the device was a search, it was reasonable—and thus lawful—under the Fourth Amendment because "officers had reasonable suspicion, and indeed probable cause, to believe that [Jones] was a leader in a large-scale cocaine distribution conspiracy." Brief for United States 50–51. We have no occasion to consider this argument. The Government did not raise it below, and the D. C. Circuit therefore did not address it. See 625 F. 3d, at 767 (Ginsburg, Tatel, and Griffith, JJ., concurring in denial of rehearing en banc). We consider the argument forfeited. See *Sprietsma* v. *Mercury Marine*, 537 U. S. 51, 56, n. 4 (2002).

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The judgment of the Court of Appeals for the D. C. Circuit is affirmed.

*It is so ordered.*

# SUPREME COURT OF THE UNITED STATES

No. 10–1259

UNITED STATES, PETITIONER *v.* ANTOINE JONES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[January 23, 2012]

JUSTICE SOTOMAYOR, concurring.

I join the Court's opinion because I agree that a search within the meaning of the Fourth Amendment occurs, at a minimum, "[w]here, as here, the Government obtains information by physically intruding on a constitutionally protected area." *Ante,* at 6, n. 3. In this case, the Government installed a Global Positioning System (GPS) tracking device on respondent Antoine Jones' Jeep without a valid warrant and without Jones' consent, then used that device to monitor the Jeep's movements over the course of four weeks. The Government usurped Jones' property for the purpose of conducting surveillance on him, thereby invading privacy interests long afforded, and undoubtedly entitled to, Fourth Amendment protection. See, *e.g., Silverman* v. *United States*, 365 U. S. 505, 511–512 (1961).

Of course, the Fourth Amendment is not concerned only with trespassory intrusions on property. See, *e.g., Kyllo* v. *United States*, 533 U. S. 27, 31–33 (2001). Rather, even in the absence of a trespass, "a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Id.,* at 33; see also *Smith* v. *Maryland*, 442 U. S. 735, 740–741 (1979); *Katz* v. *United States*, 389 U. S. 347, 361 (1967) (Harlan, J., concurring). In *Katz*, this Court enlarged its then-prevailing focus on property rights by announcing

that the reach of the Fourth Amendment does not "turn upon the presence or absence of a physical intrusion." *Id.,* at 353. As the majority's opinion makes clear, however, *Katz*'s reasonable-expectation-of-privacy test augmented, but did not displace or diminish, the common-law trespassory test that preceded it. *Ante,* at 8. Thus, "when the Government *does* engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment." *United States* v. *Knotts*, 460 U. S. 276, 286 (1983) (Brennan, J., concurring in judgment); see also, *e.g., Rakas* v. *Illinois*, 439 U. S. 128, 144, n. 12 (1978). JUSTICE ALITO's approach, which discounts altogether the constitutional relevance of the Government's physical intrusion on Jones' Jeep, erodes that longstanding protection for privacy expectations inherent in items of property that people possess or control. See *post,* at 5–7 (opinion concurring in judgment). By contrast, the trespassory test applied in the majority's opinion reflects an irreducible constitutional minimum: When the Government physically invades personal property to gather information, a search occurs. The reaffirmation of that principle suffices to decide this case.

Nonetheless, as JUSTICE ALITO notes, physical intrusion is now unnecessary to many forms of surveillance. *Post,* at 9–12. With increasing regularity, the Government will be capable of duplicating the monitoring undertaken in this case by enlisting factory- or owner-installed vehicle tracking devices or GPS-enabled smartphones. See *United States* v. *Pineda-Moreno*, 617 F. 3d 1120, 1125 (CA9 2010) (Kozinski, C. J., dissenting from denial of rehearing en banc). In cases of electronic or other novel modes of surveillance that do not depend upon a physical invasion on property, the majority opinion's trespassory test may provide little guidance. But "[s]ituations involving merely the transmission of electronic signals without trespass

would *remain* subject to *Katz* analysis." *Ante,* at 11. As JUSTICE ALITO incisively observes, the same technological advances that have made possible nontrespassory surveillance techniques will also affect the *Katz* test by shaping the evolution of societal privacy expectations. *Post,* at 10–11. Under that rubric, I agree with JUSTICE ALITO that, at the very least, "longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy." *Post,* at 13.

In cases involving even short-term monitoring, some unique attributes of GPS surveillance relevant to the *Katz* analysis will require particular attention. GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations. See, *e.g., People* v. *Weaver*, 12 N. Y. 3d 433, 441–442, 909 N. E. 2d 1195, 1199 (2009) ("Disclosed in [GPS] data . . . will be trips the indisputably private nature of which takes little imagination to conjure: trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on"). The Government can store such records and efficiently mine them for information years into the future. *Pineda-Moreno*, 617 F. 3d, at 1124 (opinion of Kozinski, C. J.). And because GPS monitoring is cheap in comparison to conventional surveillance techniques and, by design, proceeds surreptitiously, it evades the ordinary checks that constrain abusive law enforcement practices: "limited police resources and community hostility." *Illinois* v. *Lidster*, 540 U. S. 419, 426 (2004).

Awareness that the Government may be watching chills associational and expressive freedoms. And the Government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse. The net

result is that GPS monitoring—by making available at a relatively low cost such a substantial quantum of intimate information about any person whom the Government, in its unfettered discretion, chooses to track—may "alter the relationship between citizen and government in a way that is inimical to democratic society." *United States* v. *Cuevas-Perez*, 640 F. 3d 272, 285 (CA7 2011) (Flaum, J., concurring).

I would take these attributes of GPS monitoring into account when considering the existence of a reasonable societal expectation of privacy in the sum of one's public movements. I would ask whether people reasonably expect that their movements will be recorded and aggregated in a manner that enables the Government to ascertain, more or less at will, their political and religious beliefs, sexual habits, and so on. I do not regard as dispositive the fact that the Government might obtain the fruits of GPS monitoring through lawful conventional surveillance techniques. See *Kyllo*, 533 U. S., at 35, n. 2; *ante,* at 11 (leaving open the possibility that duplicating traditional surveillance "through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy"). I would also consider the appropriateness of entrusting to the Executive, in the absence of any oversight from a coordinate branch, a tool so amenable to misuse, especially in light of the Fourth Amendment's goal to curb arbitrary exercises of police power to and prevent "a too permeating police surveillance," *United States* v. *Di Re*, 332 U. S. 581, 595 (1948).*

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* *United States* v. *Knotts*, 460 U. S. 276 (1983), does not foreclose the conclusion that GPS monitoring, in the absence of a physical intrusion, is a Fourth Amendment search. As the majority's opinion notes, *Knotts* reserved the question whether "'different constitutional principles may be applicable'" to invasive law enforcement practices such as GPS tracking. See *ante,* at 8, n. 6 (quoting 460 U. S., at 284).

*United States* v. *Karo*, 468 U. S. 705 (1984), addressed the Fourth

More fundamentally, it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. *E.g., Smith*, 442 U. S., at 742; *United States* v. *Miller*, 425 U. S. 435, 443 (1976). This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks. People disclose the phone numbers that they dial or text to their cellular providers; the URLs that they visit and the e-mail addresses with which they correspond to their Internet service providers; and the books, groceries, and medications they purchase to online retailers. Perhaps, as JUSTICE ALITO notes, some people may find the "tradeoff" of privacy for convenience "worthwhile," or come to accept this "diminution of privacy" as "inevitable," *post,* at 10, and perhaps not. I for one doubt that people would accept without complaint the warrantless disclosure to the Government of a list of every Web site they had visited in the last week, or month, or year. But whatever the societal expectations, they can attain constitutionally protected status only if our Fourth Amendment jurisprudence ceases

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Amendment implications of the installation of a beeper in a container with the consent of the container's original owner, who was aware that the beeper would be used for surveillance purposes. *Id.,* at 707. Owners of GPS-equipped cars and smartphones do not contemplate that these devices will be used to enable covert surveillance of their movements. To the contrary, subscribers of one such service greeted a similar suggestion with anger. Quain, Changes to OnStar's Privacy Terms Rile Some Users, N. Y. Times (Sept. 22, 2011), online at http://wheels.blogs.nytimes.com/2011/09/22/changes-to-onstars-privacy-terms-rile-some-users (as visited Jan. 19, 2012, and available in Clerk of Court's case file). In addition, the bugged container in *Karo* lacked the close relationship with the target that a car shares with its owner. The bugged container in *Karo* was stationary for much of the Government's surveillance. See 468 U. S., at 708–710. A car's movements, by contrast, are its owner's movements.

to treat secrecy as a prerequisite for privacy. I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection. See *Smith*, 442 U. S., at 749 (Marshall, J., dissenting) ("Privacy is not a discrete commodity, possessed absolutely or not at all. Those who disclose certain facts to a bank or phone company for a limited business purpose need not assume that this information will be released to other persons for other purposes"); see also *Katz*, 389 U. S., at 351–352 ("[W]hat [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected").

Resolution of these difficult questions in this case is unnecessary, however, because the Government's physical intrusion on Jones' Jeep supplies a narrower basis for decision. I therefore join the majority's opinion.

# SUPREME COURT OF THE UNITED STATES

No. 10–1259

UNITED STATES, PETITIONER *v.* ANTOINE JONES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[January 23, 2012]

JUSTICE ALITO, with whom JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE KAGAN join, concurring in the judgment.

This case requires us to apply the Fourth Amendment's prohibition of unreasonable searches and seizures to a 21st-century surveillance technique, the use of a Global Positioning System (GPS) device to monitor a vehicle's movements for an extended period of time. Ironically, the Court has chosen to decide this case based on 18th-century tort law. By attaching a small GPS device[1] to the underside of the vehicle that respondent drove, the law enforcement officers in this case engaged in conduct that might have provided grounds in 1791 for a suit for trespass to chattels.[2] And for this reason, the Court concludes, the installation and use of the GPS device constituted a search. *Ante*, at 3–4.

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[1] Although the record does not reveal the size or weight of the device used in this case, there is now a device in use that weighs two ounces and is the size of a credit card. Tr. of Oral Arg. 27.

[2] At common law, a suit for trespass to chattels could be maintained if there was a violation of "the dignitary interest in the inviolability of chattels," but today there must be "some actual damage to the chattel before the action can be maintained." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser & Keeton on Law of Torts 87 (5th ed. 1984) (hereinafter Prosser & Keeton). Here, there was no actual damage to the vehicle to which the GPS device was attached.

This holding, in my judgment, is unwise. It strains the language of the Fourth Amendment; it has little if any support in current Fourth Amendment case law; and it is highly artificial.

I would analyze the question presented in this case by asking whether respondent's reasonable expectations of privacy were violated by the long-term monitoring of the movements of the vehicle he drove.

## I

### A

The Fourth Amendment prohibits "unreasonable searches and seizures," and the Court makes very little effort to explain how the attachment or use of the GPS device fits within these terms. The Court does not contend that there was a seizure. A seizure of property occurs when there is "some meaningful interference with an individual's possessory interests in that property," *United States* v. *Jacobsen,* 466 U. S. 109, 113 (1984), and here there was none. Indeed, the success of the surveillance technique that the officers employed was dependent on the fact that the GPS did not interfere in any way with the operation of the vehicle, for if any such interference had been detected, the device might have been discovered.

The Court does claim that the installation and use of the GPS constituted a search, see *ante,* at 3–4, but this conclusion is dependent on the questionable proposition that these two procedures cannot be separated for purposes of Fourth Amendment analysis. If these two procedures are analyzed separately, it is not at all clear from the Court's opinion why either should be regarded as a search. It is clear that the attachment of the GPS device was not itself a search; if the device had not functioned or if the officers had not used it, no information would have been obtained. And the Court does not contend that the use of the device constituted a search either. On the contrary, the Court

accepts the holding in *United States* v. *Knotts*, 460 U. S. 276 (1983), that the use of a surreptitiously planted electronic device to monitor a vehicle's movements on public roads did not amount to a search. See *ante*, at 7.

The Court argues—and I agree—that "we must 'assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'" *Ante*, at 5 (quoting *Kyllo* v. *United States*, 533 U. S. 27, 34 (2001)). But it is almost impossible to think of late-18th-century situations that are analogous to what took place in this case. (Is it possible to imagine a case in which a constable secreted himself somewhere in a coach and remained there for a period of time in order to monitor the movements of the coach's owner?[3]) The Court's theory seems to be that the concept of a search, as originally understood, comprehended any technical trespass that led to the gathering of evidence, but we know that this is incorrect. At common law, any unauthorized intrusion on private property was actionable, see Prosser & Keeton 75, but a trespass on open fields, as opposed to the "curtilage" of a home, does not fall within the scope of the Fourth Amendment because private property outside the curtilage is not part of a "hous[e]" within the meaning of the Fourth Amendment. See *Oliver* v. *United State*s, 466 U. S. 170 (1984); *Hester* v. *United States*, 265 U. S. 57 (1924).

B

The Court's reasoning in this case is very similar to that in the Court's early decisions involving wiretapping and electronic eavesdropping, namely, that a technical trespass followed by the gathering of evidence constitutes a

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[3] The Court suggests that something like this might have occurred in 1791, but this would have required either a gigantic coach, a very tiny constable, or both—not to mention a constable with incredible fortitude and patience.

search. In the early electronic surveillance cases, the Court concluded that a Fourth Amendment search occurred when private conversations were monitored as a result of an "unauthorized physical penetration into the premises occupied" by the defendant. *Silverman* v. *United States*, 365 U. S. 505, 509 (1961). In *Silverman*, police officers listened to conversations in an attached home by inserting a "spike mike" through the wall that this house shared with the vacant house next door. *Id.,* at 506. This procedure was held to be a search because the mike made contact with a heating duct on the other side of the wall and thus "usurp[ed] . . . an integral part of the premises." *Id.,* at 511.

By contrast, in cases in which there was no trespass, it was held that there was no search. Thus, in *Olmstead* v. *United States*, 277 U. S. 438 (1928), the Court found that the Fourth Amendment did not apply because "[t]he taps from house lines were made in the streets near the houses." *Id.*, at 457. Similarly, the Court concluded that no search occurred in *Goldman* v. *United States*, 316 U. S. 129, 135 (1942), where a "detectaphone" was placed on the outer wall of defendant's office for the purpose of overhearing conversations held within the room.

This trespass-based rule was repeatedly criticized. In *Olmstead*, Justice Brandeis wrote that it was "immaterial where the physical connection with the telephone wires was made." 277 U. S., at 479 (dissenting opinion). Although a private conversation transmitted by wire did not fall within the literal words of the Fourth Amendment, he argued, the Amendment should be understood as prohibiting "every unjustifiable intrusion by the government upon the privacy of the individual." *Id.,* at 478. See also, *e.g.*, *Silverman*, *supra*, at 513 (Douglas, J., concurring) ("The concept of 'an unauthorized physical penetration into the premises,' on which the present decision rests seems to me beside the point. Was not the wrong . . . done when the

intimacies of the home were tapped, recorded, or revealed? The depth of the penetration of the electronic device—even the degree of its remoteness from the inside of the house—is not the measure of the injury"); *Goldman*, *supra*, at 139 (Murphy, J., dissenting) ("[T]he search of one's home or office no longer requires physical entry, for science has brought forth far more effective devices for the invasion of a person's privacy than the direct and obvious methods of oppression which were detested by our forebears and which inspired the Fourth Amendment").

*Katz* v. *United States*, 389 U. S. 347 (1967), finally did away with the old approach, holding that a trespass was not required for a Fourth Amendment violation. *Katz* involved the use of a listening device that was attached to the outside of a public telephone booth and that allowed police officers to eavesdrop on one end of the target's phone conversation. This procedure did not physically intrude on the area occupied by the target, but the *Katz* Court, "repudiate[ed]" the old doctrine, *Rakas* v. *Illinois*, 439 U. S. 128, 143 (1978), and held that "[t]he fact that the electronic device employed . . . did not happen to penetrate the wall of the booth can have no constitutional significance," 389 U. S., at 353 ("[T]he reach of th[e] [Fourth] Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure"); see *Rakas*, *supra*, at 143 (describing *Katz* as holding that the "capacity to claim the protection for the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place"); *Kyllo, supra,* at 32 ("We have since decoupled violation of a person's Fourth Amendment rights from trespassory violation of his property"). What mattered, the Court now held, was whether the conduct at issue "violated the privacy upon which [the defendant] justifiably relied while using the telephone booth." *Katz, supra*,

at 353.

Under this approach, as the Court later put it when addressing the relevance of a technical trespass, "an actual trespass is neither necessary *nor sufficient* to establish a constitutional violation." *United States* v. *Karo,* 468 U. S. 705, 713 (1984) (emphasis added). *Ibid.* ("Compar[ing] *Katz* v. *United States*, 389 U. S. 347 (1967) (no trespass, but Fourth Amendment violation), with *Oliver* v. *United States*, 466 U. S. 170 (1984) (trespass, but no Fourth Amendment violation)"). In *Oliver,* the Court wrote:

> "The existence of a property right is but one element in determining whether expectations of privacy are legitimate. 'The premise that property interests control the right of the Government to search and seize has been discredited.' *Katz*, 389 U. S., at 353, (quoting *Warden* v. *Hayden*, 387 U. S. 294, 304 (1967); some internal quotation marks omitted)." 466 U. S., at 183.

## II

The majority suggests that two post-*Katz* decisions—*Soldal* v. *Cook County*, 506 U. S. 56 (1992), and *Alderman* v. *United States*, 394 U. S. 165 (1969)—show that a technical trespass is sufficient to establish the existence of a search, but they provide little support.

In *Soldal*, the Court held that towing away a trailer home without the owner's consent constituted a seizure even if this did not invade the occupants' personal privacy. But in the present case, the Court does not find that there was a seizure, and it is clear that none occurred.

In *Alderman,* the Court held that the Fourth Amendment rights of homeowners were implicated by the use of a surreptitiously planted listening device to monitor third-party conversations that occurred within their home. See 394 U. S., at 176–180. *Alderman* is best understood to

mean that the homeowners had a legitimate expectation of privacy in all conversations that took place under their roof. See *Rakas*, 439 U. S., at 144, n. 12 (citing *Alderman* for the proposition that "the Court has not altogether abandoned use of property concepts in determining the presence or absence of the privacy interests protected by that Amendment"); 439 U. S., at 153 (Powell, J., concurring) (citing *Alderman* for the proposition that "property rights reflect society's explicit recognition of a person's authority to act as he wishes in certain areas, and therefore should be considered in determining whether an individual's expectations of privacy are reasonable); *Karo*, *supra*, at 732 (Stevens, J., concurring in part and dissenting in part) (citing *Alderman* in support of the proposition that "a homeowner has a reasonable expectation of privacy in the contents of his home, including items owned by others").

In sum, the majority is hard pressed to find support in post-*Katz* cases for its trespass-based theory.

## III

Disharmony with a substantial body of existing case law is only one of the problems with the Court's approach in this case.

I will briefly note four others. First, the Court's reasoning largely disregards what is really important (the *use* of a GPS for the purpose of long-term tracking) and instead attaches great significance to something that most would view as relatively minor (attaching to the bottom of a car a small, light object that does not interfere in any way with the car's operation). Attaching such an object is generally regarded as so trivial that it does not provide a basis for recovery under modern tort law. See Prosser & Keeton §14, at 87 (harmless or trivial contact with personal property not actionable); D. Dobbs, Law of Torts 124 (2000) (same). But under the Court's reasoning, this conduct

may violate the Fourth Amendment. By contrast, if long-term monitoring can be accomplished without committing a technical trespass—suppose, for example, that the Federal Government required or persuaded auto manufacturers to include a GPS tracking device in every car—the Court's theory would provide no protection.

Second, the Court's approach leads to incongruous results. If the police attach a GPS device to a car and use the device to follow the car for even a brief time, under the Court's theory, the Fourth Amendment applies. But if the police follow the same car for a much longer period using unmarked cars and aerial assistance, this tracking is not subject to any Fourth Amendment constraints.

In the present case, the Fourth Amendment applies, the Court concludes, because the officers installed the GPS device after respondent's wife, to whom the car was registered, turned it over to respondent for his exclusive use. See *ante*, at 8. But if the GPS had been attached prior to that time, the Court's theory would lead to a different result. The Court proceeds on the assumption that respondent "had at least the property rights of a bailee," *ante*, at 3, n. 2, but a bailee may sue for a trespass to chattel only if the injury occurs during the term of the bailment. See 8A Am. Jur. 2d, Bailment §166, pp. 685–686 (2009). So if the GPS device had been installed before respondent's wife gave him the keys, respondent would have no claim for trespass—and, presumably, no Fourth Amendment claim either.

Third, under the Court's theory, the coverage of the Fourth Amendment may vary from State to State. If the events at issue here had occurred in a community property State[4] or a State that has adopted the Uniform Marital

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[4] See, *e.g.*, Cal. Family Code Ann. §760 (West 2004).

Property Act,[5] respondent would likely be an owner of the vehicle, and it would not matter whether the GPS was installed before or after his wife turned over the keys. In non-community-property States, on the other hand, the registration of the vehicle in the name of respondent's wife would generally be regarded as presumptive evidence that she was the sole owner. See 60 C. J. S., Motor Vehicles §231, pp. 398–399 (2002); 8 Am. Jur. 2d, Automobiles §1208, pp. 859–860 (2007).

Fourth, the Court's reliance on the law of trespass will present particularly vexing problems in cases involving surveillance that is carried out by making electronic, as opposed to physical, contact with the item to be tracked. For example, suppose that the officers in the present case had followed respondent by surreptitiously activating a stolen vehicle detection system that came with the car when it was purchased. Would the sending of a radio signal to activate this system constitute a trespass to chattels? Trespass to chattels has traditionally required a physical touching of the property. See Restatement (Second) of Torts §217 and Comment *e* (1963 and 1964); Dobbs, *supra*, at 123. In recent years, courts have wrestled with the application of this old tort in cases involving unwanted electronic contact with computer systems, and some have held that even the transmission of electrons that occurs when a communication is sent from one computer to another is enough. See, *e.g., CompuServe, Inc.* v. *Cyber Promotions*, *Inc.* 962 F. Supp. 1015, 1021 (SD Ohio 1997); *Thrifty-Tel, Inc.* v. *Bezenek*, 46 Cal. App. 4th 1559, 1566, n. 6 (1996). But may such decisions be followed in applying the Court's trespass theory? Assuming that what matters under the Court's theory is the law of trespass as it existed at the time of the adoption of the Fourth

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[5] See Uniform Marital Property Act §4, 9A U. L. A. 116 (1998).

Amendment, do these recent decisions represent a change in the law or simply the application of the old tort to new situations?

## IV

### A

The *Katz* expectation-of-privacy test avoids the problems and complications noted above, but it is not without its own difficulties. It involves a degree of circularity, see *Kyllo*, 533 U. S., at 34, and judges are apt to confuse their own expectations of privacy with those of the hypothetical reasonable person to which the *Katz* test looks. See *Minnesota* v. *Carter*, 525 U. S. 83, 97 (1998) (SCALIA, J., concurring). In addition, the *Katz* test rests on the assumption that this hypothetical reasonable person has a well-developed and stable set of privacy expectations. But technology can change those expectations. Dramatic technological change may lead to periods in which popular expectations are in flux and may ultimately produce significant changes in popular attitudes. New technology may provide increased convenience or security at the expense of privacy, and many people may find the tradeoff worthwhile. And even if the public does not welcome the diminution of privacy that new technology entails, they may eventually reconcile themselves to this development as inevitable.[6]

On the other hand, concern about new intrusions on privacy may spur the enactment of legislation to protect against these intrusions. This is what ultimately happened with respect to wiretapping. After *Katz*, Congress

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[6] See, *e.g.*, NPR, The End of Privacy http://www.npr.org/series/114250076/the-end-of-privacy (all Internet materials as visited Jan. 20, 2012, and available in Clerk of Court's case file); Time Magazine, Everything About You Is Being Tracked—Get Over It, Joel Stein, Mar. 21, 2011, Vol. 177, No. 11.

did not leave it to the courts to develop a body of Fourth Amendment case law governing that complex subject. Instead, Congress promptly enacted a comprehensive statute, see 18 U. S. C. §§2510–2522 (2006 ed. and Supp. IV), and since that time, the regulation of wiretapping has been governed primarily by statute and not by case law.[7] In an ironic sense, although *Katz* overruled *Olmstead*, Chief Justice Taft's suggestion in the latter case that the regulation of wiretapping was a matter better left for Congress, see 277 U. S., at 465–466, has been borne out.

B

Recent years have seen the emergence of many new devices that permit the monitoring of a person's movements. In some locales, closed-circuit television video monitoring is becoming ubiquitous. On toll roads, automatic toll collection systems create a precise record of the movements of motorists who choose to make use of that convenience. Many motorists purchase cars that are equipped with devices that permit a central station to ascertain the car's location at any time so that roadside assistance may be provided if needed and the car may be found if it is stolen.

Perhaps most significant, cell phones and other wireless devices now permit wireless carriers to track and record the location of users—and as of June 2011, it has been reported, there were more than 322 million wireless devices in use in the United States.[8] For older phones, the accuracy of the location information depends on the density of the tower network, but new "smart phones," which

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[7] See Kerr, The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution, 102 Mich. L. Rev. 801, 850–851 (2004) (hereinafter Kerr).

[8] See CTIA Consumer Info, 50 Wireless Quick Facts, http://www.ctia.org/consumer_info/index.cfm/AID/10323.

are equipped with a GPS device, permit more precise tracking. For example, when a user activates the GPS on such a phone, a provider is able to monitor the phone's location and speed of movement and can then report back real-time traffic conditions after combining ("crowdsourcing") the speed of all such phones on any particular road.[9] Similarly, phone-location-tracking services are offered as "social" tools, allowing consumers to find (or to avoid) others who enroll in these services. The availability and use of these and other new devices will continue to shape the average person's expectations about the privacy of his or her daily movements.

V

In the pre-computer age, the greatest protections of privacy were neither constitutional nor statutory, but practical. Traditional surveillance for any extended period of time was difficult and costly and therefore rarely undertaken. The surveillance at issue in this case—constant monitoring of the location of a vehicle for four weeks—would have required a large team of agents, multiple vehicles, and perhaps aerial assistance.[10] Only an investigation of unusual importance could have justified such an

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[9] See, *e.g.*, The bright side of sitting in traffic: Crowdsourcing road congestion data, Google Blog, http://googleblog.blogspot.com/2009/08/bright-side-of-sitting-in-traffic.html.

[10] Even with a radio transmitter like those used in *United States* v. *Knotts*, 460 U. S. 276 (1983), or *United States* v. *Karo,* 468 U. S. 705 (1984), such long-term surveillance would have been exceptionally demanding. The beepers used in those cases merely "emit[ted] periodic signals that [could] be picked up by a radio receiver." *Knotts*, 460 U.S., at 277. The signal had a limited range and could be lost if the police did not stay close enough. Indeed, in *Knotts* itself, officers lost the signal from the beeper, and only "with the assistance of a monitoring device located in a helicopter [was] the approximate location of the signal . . . picked up again about one hour later." *Id.*, at 278.

expenditure of law enforcement resources. Devices like the one used in the present case, however, make long-term monitoring relatively easy and cheap. In circumstances involving dramatic technological change, the best solution to privacy concerns may be legislative. See, *e.g.*, Kerr, 102 Mich. L. Rev., at 805–806. A legislative body is well situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way.

To date, however, Congress and most States have not enacted statutes regulating the use of GPS tracking technology for law enforcement purposes. The best that we can do in this case is to apply existing Fourth Amendment doctrine and to ask whether the use of GPS tracking in a particular case involved a degree of intrusion that a reasonable person would not have anticipated.

Under this approach, relatively short-term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable. See *Knotts,* 460 U. S., at 281–282. But the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy. For such offenses, society's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period. In this case, for four weeks, law enforcement agents tracked every movement that respondent made in the vehicle he was driving. We need not identify with precision the point at which the tracking of this vehicle became a search, for the line was surely crossed before the 4-week mark. Other cases may present more difficult questions. But where uncertainty exists with respect to whether a certain period of GPS surveil

lance is long enough to constitute a Fourth Amendment search, the police may always seek a warrant.[11] We also need not consider whether prolonged GPS monitoring in the context of investigations involving extraordinary offenses would similarly intrude on a constitutionally protected sphere of privacy. In such cases, long-term tracking might have been mounted using previously available techniques.

* * *

For these reasons, I conclude that the lengthy monitoring that occurred in this case constituted a search under the Fourth Amendment. I therefore agree with the majority that the decision of the Court of Appeals must be affirmed.

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[11] In this case, the agents obtained a warrant, but they did not comply with two of the warrant's restrictions: They did not install the GPS device within the 10-day period required by the terms of the warrant and by Fed. Rule Crim. Proc. 41(e)(2)(B)(i), and they did not install the GPS device within the District of Columbia, as required by the terms of the warrant and by 18 U. S. C. §3117(a) and Rule 41(b)(4). In the courts below the Government did not argue, and has not argued here, that the Fourth Amendment does not impose these precise restrictions and that the violation of these restrictions does not demand the suppression of evidence obtained using the tracking device. See, *e.g.*, *United States* v. *Gerber*, 994 F. 2d 1556, 1559–1560 (CA11 1993); *United States* v. *Burke*, 517 F. 2d 377, 386–387 (CA2 1975). Because it was not raised, that question is not before us.

Syllabus

# UNITED STATES v. SALERNO ET AL.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 86-87. Argued January 21, 1987—Decided May 26, 1987

The Bail Reform Act of 1984 (Act) requires courts to detain prior to trial arrestees charged with certain serious felonies if the Government demonstrates by clear and convincing evidence after an adversary hearing that no release conditions "will reasonably assure . . . the safety of any other person and the community." 18 U. S. C. § 3142(e) (1982 ed., Supp. III). The Act provides arrestees with a number of procedural rights at the detention hearing, including the right to request counsel, to testify, to present witnesses, to proffer evidence, and to cross-examine other witnesses. The Act also specifies the factors to be considered in making the detention decision, including the nature and seriousness of the charges, the substantiality of the Government's evidence, the arrestee's background and characteristics, and the nature and seriousness of the danger posed by his release. Under the Act, a decision to detain must be supported by written findings of fact and a statement of reasons, and is immediately reviewable. After a hearing under the Act, the District Court ordered the detention of respondents, who had been charged with 35 acts of racketeering activity. The Court of Appeals reversed, holding that § 3142(e)'s authorization of pretrial detention on the ground of future dangerousness is facially unconstitutional as violative of the Fifth Amendment's substantive due process guarantee.

*Held:*

1. Given the Act's legitimate and compelling regulatory purpose and the procedural protections it offers, § 3142(e) is not facially invalid under the Due Process Clause. Pp. 746-752.

(a) The argument that the Act violates substantive due process because the detention it authorizes constitutes impermissible punishment before trial is unpersuasive. The Act's legislative history clearly indicates that Congress formulated the detention provisions not as punishment for dangerous individuals, but as a potential solution to the pressing societal problem of crimes committed by persons on release. Preventing danger to the community is a legitimate regulatory goal. Moreover, the incidents of detention under the Act are not excessive in relation to that goal, since the Act carefully limits the circumstances under which detention may be sought to the most serious of crimes, the arrestee is entitled to a prompt hearing, the maximum length of deten-

tion is limited by the Speedy Trial Act, and detainees must be housed apart from convicts. Thus, the Act constitutes permissible regulation rather than impermissible punishment. Pp. 746–748.

(b) The Court of Appeals erred in ruling that the Due Process Clause categorically prohibits pretrial detention that is imposed as a regulatory measure on the ground of community danger. The Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest. Such circumstances exist here. The Act narrowly focuses on a particularly acute problem—crime by arrestees—in which the Government's interests are overwhelming. Moreover, the Act operates only on individuals who have been arrested for particular extremely serious offenses, and carefully delineates the circumstances under which detention will be permitted. Pp. 748–751.

(c) The Act's extensive procedural safeguards are specifically designed to further the accuracy of the likelihood-of-future-dangerousness determination, and are sufficient to withstand respondents' facial challenge, since they are more than "adequate to authorize the pretrial detention of at least some [persons] charged with crimes." *Schall* v. *Martin*, 467 U. S. 253, 264. Pp. 751–752.

2. Section 3142(e) is not facially unconstitutional as violative of the Excessive Bail Clause of the Eighth Amendment. The contention that the Act violates the Clause because it allows courts essentially to set bail at an infinite amount for reasons not related to the risk of flight is not persuasive. Nothing in the Clause's text limits the Government's interest in the setting of bail solely to the prevention of flight. Where Congress has mandated detention on the basis of some other compelling interest—here, the public safety—the Eighth Amendment does not require release on bail. Pp. 752–755.

794 F. 2d 64, reversed.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, O'CONNOR, and SCALIA, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 755. STEVENS, J., filed a dissenting opinion, *post*, p. 767.

*Solicitor General Fried* argued the cause for the United States. With him on the briefs were *Assistant Attorney General Weld, Deputy Solicitor General Bryson, Jeffrey P. Minear, Samuel Rosenthal*, and *Maury S. Epner*.

*Anthony M. Cardinale* argued the cause for respondents. With him on the brief was *Kimberly Homan.**

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

The Bail Reform Act of 1984 (Act) allows a federal court to detain an arrestee pending trial if the Government demonstrates by clear and convincing evidence after an adversary hearing that no release conditions "will reasonably assure . . . the safety of any other person and the community." The United States Court of Appeals for the Second Circuit struck down this provision of the Act as facially unconstitutional, because, in that court's words, this type of pretrial detention violates "substantive due process." We granted certiorari because of a conflict among the Courts of Appeals regarding the validity of the Act.[1] 479 U. S. 929 (1986). We hold that, as against the facial attack mounted by these respondents, the Act fully comports with constitutional requirements. We therefore reverse.

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*Briefs of *amici curiae* urging affirmance were filed for the National Association of Criminal Defense Lawyers by *Jon May* and *Mark King Leban;* and for the Public Defender Service by *Cheryl M. Long, James Klein,* and *David A. Reiser.*

Briefs of *amici curiae* were filed for the American Bar Association by *Eugene C. Thomas, Charles G. Cole,* and *David A. Schlueter;* for the American Civil Liberties Union et al. by *William J. Genego, Dennis E. Curtis, Mark Rosenbaum, Paul Hoffman, Richard Emery, Martin Guggenheim, Alvin Bronstein,* and *David Goldstein;* and for Howard Perry by *Allen N. Brunwasser.*

[1] Every other Court of Appeals to have considered the validity of the Bail Reform Act of 1984 has rejected the facial constitutional challenge. *United States* v. *Walker,* 805 F. 2d 1042 (CA11 1986); *United States* v. *Rodriguez,* 803 F. 2d 1102 (CA11 1986); *United States* v. *Simpkins,* 255 U. S. App. D. C. 306, 801 F. 2d 520 (1986); *United States* v. *Zannino,* 798 F. 2d 544 (CA1 1983); *United States* v. *Perry,* 788 F. 2d 100 (CA3), cert. denied, 479 U. S. 864 (1986); *United States* v. *Portes,* 786 F. 2d 758 (CA7 1985).

I

Responding to "the alarming problem of crimes committed by persons on release," S. Rep. No. 98–225, p. 3 (1983), Congress formulated the Bail Reform Act of 1984, 18 U. S. C. § 3141 *et seq.* (1982 ed., Supp. III), as the solution to a bail crisis in the federal courts. The Act represents the National Legislature's considered response to numerous perceived deficiencies in the federal bail process. By providing for sweeping changes in both the way federal courts consider bail applications and the circumstances under which bail is granted, Congress hoped to "give the courts adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released." S. Rep. No. 98–225, at 3.

To this end, § 3141(a) of the Act requires a judicial officer to determine whether an arrestee shall be detained. Section 3142(e) provides that "[i]f, after a hearing pursuant to the provisions of subsection (f), the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, he shall order the detention of the person prior to trial." Section 3142(f) provides the arrestee with a number of procedural safeguards. He may request the presence of counsel at the detention hearing, he may testify and present witnesses in his behalf, as well as proffer evidence, and he may cross-examine other witnesses appearing at the hearing. If the judicial officer finds that no conditions of pretrial release can reasonably assure the safety of other persons and the community, he must state his findings of fact in writing, § 3142(i), and support his conclusion with "clear and convincing evidence," § 3142(f).

The judicial officer is not given unbridled discretion in making the detention determination. Congress has specified the considerations relevant to that decision. These factors include the nature and seriousness of the charges, the substantiality of the Government's evidence against the arrestee, the

arrestee's background and characteristics, and the nature and seriousness of the danger posed by the suspect's release. § 3142(g). Should a judicial officer order detention, the detainee is entitled to expedited appellate review of the detention order. §§ 3145(b), (c).

Respondents Anthony Salerno and Vincent Cafaro were arrested on March 21, 1986, after being charged in a 29-count indictment alleging various Racketeer Influenced and Corrupt Organizations Act (RICO) violations, mail and wire fraud offenses, extortion, and various criminal gambling violations. The RICO counts alleged 35 acts of racketeering activity, including fraud, extortion, gambling, and conspiracy to commit murder. At respondents' arraignment, the Government moved to have Salerno and Cafaro detained pursuant to § 3142(e), on the ground that no condition of release would assure the safety of the community or any person. The District Court held a hearing at which the Government made a detailed proffer of evidence. The Government's case showed that Salerno was the "boss" of the Genovese crime family of La Cosa Nostra and that Cafaro was a "captain" in the Genovese family. According to the Government's proffer, based in large part on conversations intercepted by a court-ordered wiretap, the two respondents had participated in wide-ranging conspiracies to aid their illegitimate enterprises through violent means. The Government also offered the testimony of two of its trial witnesses, who would assert that Salerno personally participated in two murder conspiracies. Salerno opposed the motion for detention, challenging the credibility of the Government's witnesses. He offered the testimony of several character witnesses as well as a letter from his doctor stating that he was suffering from a serious medical condition. Cafaro presented no evidence at the hearing, but instead characterized the wiretap conversations as merely "tough talk."

The District Court granted the Government's detention motion, concluding that the Government had established by

clear and convincing evidence that no condition or combination of conditions of release would ensure the safety of the community or any person:

> "The activities of a criminal organization such as the Genovese Family do not cease with the arrest of its principals and their release on even the most stringent of bail conditions. The illegal businesses, in place for many years, require constant attention and protection, or they will fail. Under these circumstances, this court recognizes a strong incentive on the part of its leadership to continue business as usual. When business as usual involves threats, beatings, and murder, the present danger such people pose in the community is self-evident." 631 F. Supp. 1364, 1375 (SDNY 1986).[2]

Respondents appealed, contending that to the extent that the Bail Reform Act permits pretrial detention on the ground that the arrestee is likely to commit future crimes, it is unconstitutional on its face. Over a dissent, the United States Court of Appeals for the Second Circuit agreed. 794 F. 2d 64 (1986). Although the court agreed that pretrial detention could be imposed if the defendants were likely to intimidate witnesses or otherwise jeopardize the trial process, it found "§ 3142(e)'s authorization of pretrial detention [on the ground of future dangerousness] repugnant to the concept of substantive due process, which we believe prohibits the total deprivation of liberty simply as a means of preventing future crimes." *Id.*, at 71–72. The court concluded that the Government could not, consistent with due process, detain persons who had not been accused of any crime merely because they were thought to present a danger to the community. *Id.*, at 72, quoting *United States* v. *Melendez-Carrion*, 790 F.

[2] Salerno was subsequently sentenced in unrelated proceedings before a different judge. To this date, however, Salerno has not been confined pursuant to that sentence. The authority for Salerno's present incarceration remains the District Court's pretrial detention order. The case is therefore very much alive and is properly presented for our resolution.

2d 984, 1000–1001 (CA2 1986) (opinion of Newman, J.). It reasoned that our criminal law system holds persons accountable for past actions, not anticipated future actions. Although a court could detain an arrestee who threatened to flee before trial, such detention would be permissible because it would serve the basic objective of a criminal system—bringing the accused to trial. The court distinguished our decision in *Gerstein* v. *Pugh*, 420 U. S. 103 (1975), in which we upheld police detention pursuant to arrest. The court construed *Gerstein* as limiting such detention to the "'administrative steps incident to arrest.'" 794 F. 2d, at 74, quoting *Gerstein*, *supra*, at 114. The Court of Appeals also found our decision in *Schall* v. *Martin*, 467 U. S. 253 (1984), upholding postarrest, pretrial detention of juveniles, inapposite because juveniles have a lesser interest in liberty than do adults. The dissenting judge concluded that on its face, the Bail Reform Act adequately balanced the Federal Government's compelling interests in public safety against the detainee's liberty interests.

## II

A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the Bail Reform Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an "overbreadth" doctrine outside the limited context of the First Amendment. *Schall* v. *Martin*, *supra*, at 269, n. 18. We think respondents have failed to shoulder their heavy burden to demonstrate that the Act is "facially" unconstitutional.[3]

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[3] We intimate no view on the validity of any aspects of the Act that are not relevant to respondents' case. Nor have respondents claimed that the Act is unconstitutional because of the way it was applied to the particular facts of their case.

Respondents present two grounds for invalidating the Bail Reform Act's provisions permitting pretrial detention on the basis of future dangerousness. First, they rely upon the Court of Appeals' conclusion that the Act exceeds the limitations placed upon the Federal Government by the Due Process Clause of the Fifth Amendment. Second, they contend that the Act contravenes the Eighth Amendment's proscription against excessive bail. We treat these contentions in turn.

A

The Due Process Clause of the Fifth Amendment provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." This Court has held that the Due Process Clause protects individuals against two types of government action. So-called "substantive due process" prevents the government from engaging in conduct that "shocks the conscience," *Rochin* v. *California*, 342 U. S. 165, 172 (1952), or interferes with rights "implicit in the concept of ordered liberty," *Palko* v. *Connecticut*, 302 U. S. 319, 325–326 (1937). When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976). This requirement has traditionally been referred to as "procedural" due process.

Respondents first argue that the Act violates substantive due process because the pretrial detention it authorizes constitutes impermissible punishment before trial. See *Bell* v. *Wolfish*, 441 U. S. 520, 535, and n. 16 (1979). The Government, however, has never argued that pretrial detention could be upheld if it were "punishment." The Court of Appeals assumed that pretrial detention under the Bail Reform Act is regulatory, not penal, and we agree that it is.

As an initial matter, the mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment. *Bell* v. *Wolfish*, *supra*, at

537. To determine whether a restriction on liberty constitutes impermissible punishment or permissible regulation, we first look to legislative intent. *Schall* v. *Martin*, 467 U. S., at 269. Unless Congress expressly intended to impose punitive restrictions, the punitive/regulatory distinction turns on "'whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].'" *Ibid.*, quoting *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 168–169 (1963).

We conclude that the detention imposed by the Act falls on the regulatory side of the dichotomy. The legislative history of the Bail Reform Act clearly indicates that Congress did not formulate the pretrial detention provisions as punishment for dangerous individuals. See S. Rep. No. 98–225, at 8. Congress instead perceived pretrial detention as a potential solution to a pressing societal problem. *Id.*, at 4–7. There is no doubt that preventing danger to the community is a legitimate regulatory goal. *Schall* v. *Martin*, *supra*.

Nor are the incidents of pretrial detention excessive in relation to the regulatory goal Congress sought to achieve. The Bail Reform Act carefully limits the circumstances under which detention may be sought to the most serious of crimes. See 18 U. S. C. § 3142(f) (detention hearings available if case involves crimes of violence, offenses for which the sentence is life imprisonment or death, serious drug offenses, or certain repeat offenders). The arrestee is entitled to a prompt detention hearing, *ibid.*, and the maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act.[4] See 18 U. S. C. § 3161 *et seq.* (1982 ed. and Supp. III). Moreover, as in *Schall* v. *Martin*, the conditions of confinement envisioned by the Act "appear to reflect the regulatory purposes relied upon by the" Government.

[4] We intimate no view as to the point at which detention in a particular case might become excessively prolonged, and therefore punitive, in relation to Congress' regulatory goal.

467 U. S., at 270. As in *Schall*, the statute at issue here requires that detainees be housed in a "facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal." 18 U. S. C. § 3142(i)(2). We conclude, therefore, that the pretrial detention contemplated by the Bail Reform Act is regulatory in nature, and does not constitute punishment before trial in violation of the Due Process Clause.

The Court of Appeals nevertheless concluded that "the Due Process Clause prohibits pretrial detention on the ground of danger to the community as a regulatory measure, without regard to the duration of the detention." 794 F. 2d, at 71. Respondents characterize the Due Process Clause as erecting an impenetrable "wall" in this area that "no governmental interest—rational, important, compelling or otherwise—may surmount." Brief for Respondents 16.

We do not think the Clause lays down any such categorical imperative. We have repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest. For example, in times of war or insurrection, when society's interest is at its peak, the Government may detain individuals whom the Government believes to be dangerous. See *Ludecke* v. *Watkins*, 335 U. S. 160 (1948) (approving unreviewable executive power to detain enemy aliens in time of war); *Moyer* v. *Peabody*, 212 U. S. 78, 84–85 (1909) (rejecting due process claim of individual jailed without probable cause by Governor in time of insurrection). Even outside the exigencies of war, we have found that sufficiently compelling governmental interests can justify detention of dangerous persons. Thus, we have found no absolute constitutional barrier to detention of potentially dangerous resident aliens pending deportation proceedings. *Carlson* v. *Landon*, 342 U. S. 524, 537–542 (1952); *Wong Wing* v. *United States*, 163 U. S. 228 (1896). We have also held that the government may detain mentally unstable individuals who present a dan-

ger to the public, *Addington* v. *Texas*, 441 U. S. 418 (1979), and dangerous defendants who become incompetent to stand trial, *Jackson* v. *Indiana*, 406 U. S. 715, 731–739 (1972); *Greenwood* v. *United States*, 350 U. S. 366 (1956). We have approved of postarrest regulatory detention of juveniles when they present a continuing danger to the community. *Schall* v. *Martin*, *supra*. Even competent adults may face substantial liberty restrictions as a result of the operation of our criminal justice system. If the police suspect an individual of a crime, they may arrest and hold him until a neutral magistrate determines whether probable cause exists. *Gerstein* v. *Pugh*, 420 U. S. 103 (1975). Finally, respondents concede and the Court of Appeals noted that an arrestee may be incarcerated until trial if he presents a risk of flight, see *Bell* v. *Wolfish*, 441 U. S., at 534, or a danger to witnesses.

Respondents characterize all of these cases as exceptions to the "general rule" of substantive due process that the government may not detain a person prior to a judgment of guilt in a criminal trial. Such a "general rule" may freely be conceded, but we think that these cases show a sufficient number of exceptions to the rule that the congressional action challenged here can hardly be characterized as totally novel. Given the well-established authority of the government, in special circumstances, to restrain individuals' liberty prior to or even without criminal trial and conviction, we think that the present statute providing for pretrial detention on the basis of dangerousness must be evaluated in precisely the same manner that we evaluated the laws in the cases discussed above.

The government's interest in preventing crime by arrestees is both legitimate and compelling. *De Veau* v. *Braisted*, 363 U. S. 144, 155 (1960). In *Schall*, *supra*, we recognized the strength of the State's interest in preventing juvenile crime. This general concern with crime prevention is no less compelling when the suspects are adults. Indeed, "[t]he

harm suffered by the victim of a crime is not dependent upon the age of the perpetrator." *Schall* v. *Martin*, *supra*, at 264–265. The Bail Reform Act of 1984 responds to an even more particularized governmental interest than the interest we sustained in *Schall*. The statute we upheld in *Schall* permitted pretrial detention of any juvenile arrested on any charge after a showing that the individual might commit some undefined further crimes. The Bail Reform Act, in contrast, narrowly focuses on a particularly acute problem in which the Government interests are overwhelming. The Act operates only on individuals who have been arrested for a specific category of extremely serious offenses. 18 U. S. C. § 3142(f). Congress specifically found that these individuals are far more likely to be responsible for dangerous acts in the community after arrest. See S. Rep. No. 98–225, at 6–7. Nor is the Act by any means a scattershot attempt to incapacitate those who are merely suspected of these serious crimes. The Government must first of all demonstrate probable cause to believe that the charged crime has been committed by the arrestee, but that is not enough. In a full-blown adversary hearing, the Government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person. 18 U. S. C. § 3142(f). While the Government's general interest in preventing crime is compelling, even this interest is heightened when the Government musters convincing proof that the arrestee, already indicted or held to answer for a serious crime, presents a demonstrable danger to the community. Under these narrow circumstances, society's interest in crime prevention is at its greatest.

On the other side of the scale, of course, is the individual's strong interest in liberty. We do not minimize the importance and fundamental nature of this right. But, as our cases hold, this right may, in circumstances where the government's interest is sufficiently weighty, be subordinated

to the greater needs of society. We think that Congress' careful delineation of the circumstances under which detention will be permitted satisfies this standard. When the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community, we believe that, consistent with the Due Process Clause, a court may disable the arrestee from executing that threat. Under these circumstances, we cannot categorically state that pretrial detention "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder* v. *Massachusetts*, 291 U. S. 97, 105 (1934).

Finally, we may dispose briefly of respondents' facial challenge to the procedures of the Bail Reform Act. To sustain them against such a challenge, we need only find them "adequate to authorize the pretrial detention of at least some [persons] charged with crimes," *Schall*, *supra*, at 264, whether or not they might be insufficient in some particular circumstances. We think they pass that test. As we stated in *Schall*, "there is nothing inherently unattainable about a prediction of future criminal conduct." 467 U. S., at 278; see *Jurek* v. *Texas*, 428 U. S. 262, 274 (1976) (joint opinion of Stewart, POWELL, and STEVENS, JJ.); *id.*, at 279 (WHITE, J., concurring in judgment).

Under the Bail Reform Act, the procedures by which a judicial officer evaluates the likelihood of future dangerousness are specifically designed to further the accuracy of that determination. Detainees have a right to counsel at the detention hearing. 18 U. S. C. § 3142(f). They may testify in their own behalf, present information by proffer or otherwise, and cross-examine witnesses who appear at the hearing. *Ibid.* The judicial officer charged with the responsibility of determining the appropriateness of detention is guided by statutorily enumerated factors, which include the nature and the circumstances of the charges, the weight of the evidence, the history and characteristics of the putative of-

fender, and the danger to the community. § 3142(g). The Government must prove its case by clear and convincing evidence. § 3142(f). Finally, the judicial officer must include written findings of fact and a written statement of reasons for a decision to detain. § 3142(i). The Act's review provisions, § 3145(c), provide for immediate appellate review of the detention decision.

We think these extensive safeguards suffice to repel a facial challenge. The protections are more exacting than those we found sufficient in the juvenile context, see *Schall*, *supra*, at 275–281, and they far exceed what we found necessary to effect limited postarrest detention in *Gerstein* v. *Pugh*, 420 U. S. 103 (1975). Given the legitimate and compelling regulatory purpose of the Act and the procedural protections it offers, we conclude that the Act is not facially invalid under the Due Process Clause of the Fifth Amendment.

B

Respondents also contend that the Bail Reform Act violates the Excessive Bail Clause of the Eighth Amendment. The Court of Appeals did not address this issue because it found that the Act violates the Due Process Clause. We think that the Act survives a challenge founded upon the Eighth Amendment.

The Eighth Amendment addresses pretrial release by providing merely that "[e]xcessive bail shall not be required." This Clause, of course, says nothing about whether bail shall be available at all. Respondents nevertheless contend that this Clause grants them a right to bail calculated solely upon considerations of flight. They rely on *Stack* v. *Boyle*, 342 U. S. 1, 5 (1951), in which the Court stated that "[b]ail set at a figure higher than an amount reasonably calculated [to ensure the defendant's presence at trial] is 'excessive' under the Eighth Amendment." In respondents' view, since the Bail Reform Act allows a court essentially to set bail at an infinite amount for reasons not related to the risk of flight, it

violates the Excessive Bail Clause. Respondents concede that the right to bail they have discovered in the Eighth Amendment is not absolute. A court may, for example, refuse bail in capital cases. And, as the Court of Appeals noted and respondents admit, a court may refuse bail when the defendant presents a threat to the judicial process by intimidating witnesses. Brief for Respondents 21–22. Respondents characterize these exceptions as consistent with what they claim to be the sole purpose of bail—to ensure the integrity of the judicial process.

While we agree that a primary function of bail is to safeguard the courts' role in adjudicating the guilt or innocence of defendants, we reject the proposition that the Eighth Amendment categorically prohibits the government from pursuing other admittedly compelling interests through regulation of pretrial release. The above-quoted dictum in *Stack* v. *Boyle* is far too slender a reed on which to rest this argument. The Court in *Stack* had no occasion to consider whether the Excessive Bail Clause requires courts to admit all defendants to bail, because the statute before the Court in that case in fact allowed the defendants to be bailed. Thus, the Court had to determine only whether bail, admittedly available in that case, was excessive if set at a sum greater than that necessary to ensure the arrestees' presence at trial.

The holding of *Stack* is illuminated by the Court's holding just four months later in *Carlson* v. *Landon*, 342 U. S. 524 (1952). In that case, remarkably similar to the present action, the detainees had been arrested and held without bail pending a determination of deportability. The Attorney General refused to release the individuals, "on the ground that there was reasonable cause to believe that [their] release would be prejudicial to the public interest and *would endanger the welfare and safety of the United States.*" *Id.*, at 529 (emphasis added). The detainees brought the same challenge that respondents bring to us today: the Eighth Amend-

ment required them to be admitted to bail. The Court squarely rejected this proposition:

> "The bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept. The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. Thus, in criminal cases bail is not compulsory where the punishment may be death. Indeed, the very language of the Amendment fails to say all arrests must be bailable." *Id.*, at 545–546 (footnotes omitted).

*Carlson* v. *Landon* was a civil case, and we need not decide today whether the Excessive Bail Clause speaks at all to Congress' power to define the classes of criminal arrestees who shall be admitted to bail. For even if we were to conclude that the Eighth Amendment imposes some substantive limitations on the National Legislature's powers in this area, we would still hold that the Bail Reform Act is valid. Nothing in the text of the Bail Clause limits permissible Government considerations solely to questions of flight. The only arguable substantive limitation of the Bail Clause is that the Government's proposed conditions of release or detention not be "excessive" in light of the perceived evil. Of course, to determine whether the Government's response is excessive, we must compare that response against the interest the Government seeks to protect by means of that response. Thus, when the Government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more. *Stack* v. *Boyle*, *supra*. We believe that when Congress has mandated detention on the basis of a compelling interest other than pre-

vention of flight, as it has here, the Eighth Amendment does not require release on bail.

## III

In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception. We hold that the provisions for pretrial detention in the Bail Reform Act of 1984 fall within that carefully limited exception. The Act authorizes the detention prior to trial of arrestees charged with serious felonies who are found after an adversary hearing to pose a threat to the safety of individuals or to the community which no condition of release can dispel. The numerous procedural safeguards detailed above must attend this adversary hearing. We are unwilling to say that this congressional determination, based as it is upon that primary concern of every government—a concern for the safety and indeed the lives of its citizens—on its face violates either the Due Process Clause of the Fifth Amendment or the Excessive Bail Clause of the Eighth Amendment.

The judgment of the Court of Appeals is therefore

*Reversed.*

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

This case brings before the Court for the first time a statute in which Congress declares that a person innocent of any crime may be jailed indefinitely, pending the trial of allegations which are legally presumed to be untrue, if the Government shows to the satisfaction of a judge that the accused is likely to commit crimes, unrelated to the pending charges, at any time in the future. Such statutes, consistent with the usages of tyranny and the excesses of what bitter experience teaches us to call the police state, have long been thought incompatible with the fundamental human rights protected by our Constitution. Today a majority of this Court holds otherwise. Its decision disregards basic principles of justice

established centuries ago and enshrined beyond the reach of governmental interference in the Bill of Rights.

I

A few preliminary words are necessary with respect to the majority's treatment of the facts in this case. The two paragraphs which the majority devotes to the procedural posture are essentially correct, but they omit certain matters which are of substantial legal relevance.

The Solicitor General's petition for certiorari was filed on July 21, 1986. On October 9, 1986, respondent Salerno filed a response to the petition. No response or appearance of counsel was filed on behalf of respondent Cafaro. The petition for certiorari was granted on November 3, 1986.

On November 19, 1986, respondent Salerno was convicted after a jury trial on charges unrelated to those alleged in the indictment in this case. On January 13, 1987, Salerno was sentenced on those charges to 100 years' imprisonment. As of that date, the Government no longer required a pretrial detention order for the purpose of keeping Salerno incarcerated; it could simply take him into custody on the judgment and commitment order. The present case thus became moot as to respondent Salerno.[1]

[1] Had this judgment and commitment order been executed immediately, as is the ordinary course, the present case would certainly have been moot with respect to Salerno. On January 16, 1987, however, the District Judge who had sentenced Salerno in the unrelated proceedings issued the following order, apparently with the Government's consent:

"Inasmuch as defendant Anthony Salerno was not ordered detained in this case, but is presently being detained pretrial in the case of *United States* v. *Anthony Salerno et al.*, SS 86 Cr. 245 (MJL),

"IT IS HEREBY ORDERED that the bail status of defendant Anthony Salerno in the above-captioned case shall remain the same as it was prior to the January 13, 1987 sentencing, pending further order of the Court." Order in SS 85 Cr. 139 (RO) (SDNY) (Owen, J.).

This order is curious. To release on bail pending appeal "a person who has been found guilty of an offense and sentenced to a term of imprisonment," the District Judge was required to find "by clear and convincing evidence

The situation with respect to respondent Cafaro is still more disturbing. In early October 1986, before the Solicitor General's petition for certiorari was granted, respondent Cafaro became a cooperating witness, assisting the Government's investigation "by working in a covert capacity."[2] The information that Cafaro was cooperating with the Government was not revealed to his codefendants, including respondent Salerno. On October 9, 1986, respondent Cafaro was released, ostensibly "temporarily for medical care and treatment," with the Government's consent. Docket, SS 86 Cr. 245–2, p. 6 (MJL) (SDNY) (Lowe, J.).[3] This release was conditioned upon execution of a personal recognizance bond in the sum of $1 million, under the general pretrial

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that the person is not likely to flee or pose a danger to the safety of any other person or the community if released . . . ." 18 U. S. C. § 3143(b)(1) (1982 ed., Supp. III). In short, the District Court which had sentenced Salerno to 100 years' imprisonment then found, with the Government's consent, that he was not dangerous, in a vain attempt to keep alive the controversy as to Salerno's dangerousness before this Court.

[2] This characterization of Cafaro's activities, along with an account of the process by which Cafaro became a Government agent, appears in an affidavit executed by a former Assistant United States Attorney and filed in the District Court during proceedings in the instant case which occurred after the case was submitted to this Court. Affidavit of Warren Neil Eggleston, dated March 18, 1987, SS 86 Cr. 245, p. 4 (MJL) (SDNY).

[3] Further particulars of the Government's agreement with Cafaro, including the precise terms of the agreement to release him on bail, are not included in the record, and the Court has declined to order that the relevant documents be placed before us.

In his reply brief in this Court, the Solicitor General stated: "On October 8, 1986, Cafaro was temporarily released for medical treatment. Because he is still subject to the pretrial detention order, Cafaro's case also continues to present a live controversy." Reply Brief for United States 1–2, n. 1. The Solicitor General did not inform the Court that this release involved the execution of a personal recognizance bond, nor did he reveal that Cafaro had become a cooperating witness. I do not understand how the Solicitor General's representation that Cafaro was "still subject to the pretrial detention order" can be reconciled with the fact of his release on a $1 million personal recognizance bond.

release provisions of 18 U. S. C. § 3141 (1982 ed., Supp. III). In short, respondent Cafaro became an informant and the Government agreed to his release on bail in order that he might better serve the Government's purposes. As to Cafaro, this case was no longer justiciable even before certiorari was granted, but the information bearing upon the essential issue of the Court's jurisdiction was not made available to us.

The Government thus invites the Court to address the facial constitutionality of the pretrial detention statute in a case involving two respondents, one of whom has been sentenced to a century of jail time in another case and released pending appeal with the Government's consent, while the other was released on bail *in this case*, with the Government's consent, because he had become an informant. These facts raise, at the very least, a substantial question as to the Court's jurisdiction, for it is far from clear that there is now an actual controversy between these parties. As we have recently said, "Article III of the Constitution requires that there be a live case or controversy at the time that a federal court decides the case; it is not enough that there may have been a live case or controversy when the case was decided by the court whose judgment we are reviewing." *Burke* v. *Barnes*, 479 U. S. 361, 363 (1987); see *Sosna* v. *Iowa*, 419 U. S. 393, 402 (1975); *Golden* v. *Zwickler*, 394 U. S. 103, 108 (1969). Only by flatly ignoring these matters is the majority able to maintain the pretense that it has jurisdiction to decide the question which it is in such a hurry to reach.

## II

The majority approaches respondents' challenge to the Act by dividing the discussion into two sections, one concerned with the substantive guarantees implicit in the Due Process Clause, and the other concerned with the protection afforded by the Excessive Bail Clause of the Eighth Amendment. This is a sterile formalism, which divides a unitary argument

into two independent parts and then professes to demonstrate that the parts are individually inadequate.

On the due process side of this false dichotomy appears an argument concerning the distinction between regulatory and punitive legislation. The majority concludes that the Act is a regulatory rather than a punitive measure. The ease with which the conclusion is reached suggests the worthlessness of the achievement. The major premise is that "[u]nless Congress expressly intended to impose punitive restrictions, the punitive/regulatory distinction turns on '"whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]."'" *Ante*, at 747 (citations omitted). The majority finds that "Congress did not formulate the pretrial detention provisions as punishment for dangerous individuals," but instead was pursuing the "legitimate regulatory goal" of "preventing danger to the community." *Ibid.*[4] Concluding that pretrial detention is not an excessive solution to the problem of preventing danger to the community, the majority thus finds that no substantive element of the guarantee of due process invalidates the statute.

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[4] Preventing danger to the community through the enactment and enforcement of criminal laws is indeed a legitimate goal, but in our system the achievement of that goal is left primarily to the States. The Constitution does not contain an explicit delegation to the Federal Government of the power to define and administer the general criminal law. The Bail Reform Act does not limit its definition of dangerousness to the likelihood that the defendant poses a danger to others through the commission of *federal* crimes. Federal preventive detention may thus be ordered under the Act when the danger asserted by the Government is the danger that the defendant will violate state law. The majority nowhere identifies the constitutional source of congressional power to authorize the federal detention of persons whose predicted future conduct would not violate any federal statute and could not be punished by a federal court. I can only conclude that the Court's frequently expressed concern with the principles of federalism vanishes when it threatens to interfere with the Court's attainment of the desired result.

This argument does not demonstrate the conclusion it purports to justify. Let us apply the majority's reasoning to a similar, hypothetical case. After investigation, Congress determines (not unrealistically) that a large proportion of violent crime is perpetrated by persons who are unemployed. It also determines, equally reasonably, that much violent crime is committed at night. From amongst the panoply of "potential solutions," Congress chooses a statute which permits, after judicial proceedings, the imposition of a dusk-to-dawn curfew on anyone who is unemployed. Since this is not a measure enacted for the purpose of punishing the unemployed, and since the majority finds that preventing danger to the community is a legitimate regulatory goal, the curfew statute would, according to the majority's analysis, be a mere "regulatory" detention statute, entirely compatible with the substantive components of the Due Process Clause.

The absurdity of this conclusion arises, of course, from the majority's cramped concept of substantive due process. The majority proceeds as though the only substantive right protected by the Due Process Clause is a right to be free from punishment before conviction. The majority's technique for infringing this right is simple: merely redefine any measure which is claimed to be punishment as "regulation," and, magically, the Constitution no longer prohibits its imposition. Because, as I discuss in Part III, *infra*, the Due Process Clause protects other substantive rights which are infringed by this legislation, the majority's argument is merely an exercise in obfuscation.

The logic of the majority's Eighth Amendment analysis is equally unsatisfactory. The Eighth Amendment, as the majority notes, states that "[e]xcessive bail shall not be required." The majority then declares, as if it were undeniable, that: "[t]his Clause, of course, says nothing about whether bail shall be available at all." *Ante*, at 752. If excessive bail is imposed the defendant stays in jail. The same result is achieved if bail is denied altogether. Whether the

magistrate sets bail at $1 billion or refuses to set bail at all, the consequences are indistinguishable. It would be mere sophistry to suggest that the Eighth Amendment protects against the former decision, and not the latter. Indeed, such a result would lead to the conclusion that there was no need for Congress to pass a preventive detention measure of any kind; every federal magistrate and district judge could simply refuse, despite the absence of any evidence of risk of flight or danger to the community, to set bail. This would be entirely constitutional, since, according to the majority, the Eighth Amendment "says nothing about whether bail shall be available at all."

But perhaps, the majority says, this manifest absurdity can be avoided. Perhaps the Bail Clause is addressed only to the Judiciary. "[W]e need not decide today," the majority says, "whether the Excessive Bail Clause speaks at all to Congress' power to define the classes of criminal arrestees who shall be admitted to bail." *Ante*, at 754. The majority is correct that this question need not be decided today; it was decided long ago. Federal and state statutes which purport to accomplish what the Eighth Amendment forbids, such as imposing cruel and unusual punishments, may not stand. See, *e. g.*, *Trop* v. *Dulles*, 356 U. S. 86 (1958); *Furman* v. *Georgia*, 408 U. S. 238 (1972). The text of the Amendment, which provides simply that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted," provides absolutely no support for the majority's speculation that both courts and Congress are forbidden to inflict cruel and unusual punishments, while only the courts are forbidden to require excessive bail.[5]

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[5] The majority refers to the statement in *Carlson* v. *Landon*, 342 U. S. 524, 545 (1952), that the Bail Clause was adopted by Congress from the English Bill of Rights Act of 1689, 1 Wm. & Mary, Sess. 2, ch. II, § I(10), and that "[i]n England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail." A sufficient answer to this

The majority's attempts to deny the relevance of the Bail Clause to this case are unavailing, but the majority is nonetheless correct that the prohibition of excessive bail means that in order "to determine whether the Government's response is excessive, we must compare that response against the interest the Government seeks to protect by means of that response." *Ante*, at 754. The majority concedes, as it must, that "when the Government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more." *Ibid.* But, the majority says, "when Congress has mandated detention on the basis of a compelling interest other than prevention of flight, as it has here, the Eighth Amendment does not require release on bail." *Ante*, at 754–755. This conclusion follows only if the "compelling" interest upon which Congress acted is an interest which the Constitution permits Congress to further through the denial of bail. The majority does not ask, as a result of its disingenuous division of the analysis, if there are any substantive limits contained in both the Eighth Amendment and the Due Process Clause which render this system of preventive detention unconstitutional. The majority does not ask because the answer is apparent and, to the majority, inconvenient.

## III

The essence of this case may be found, ironically enough, in a provision of the Act to which the majority does not refer. Title 18 U. S. C. § 3142(j) (1982 ed., Supp. III) provides that "[n]othing in this section shall be construed as modifying or limiting the presumption of innocence." But the very pith

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meager argument was made at the time by Justice Black: "The Eighth Amendment is in the American Bill of Rights of 1789, not the English Bill of Rights of 1689." *Carlson* v. *Landon*, *supra*, at 557 (dissenting opinion). Our Bill of Rights is contained in a written Constitution, one of whose purposes is to protect the rights of the people against infringement by the Legislature, and its provisions, whatever their origins, are interpreted in relation to those purposes.

and purpose of this statute is an abhorrent limitation of the presumption of innocence. The majority's untenable conclusion that the present Act is constitutional arises from a specious denial of the role of the Bail Clause and the Due Process Clause in protecting the invaluable guarantee afforded by the presumption of innocence.

"The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin* v. *United States*, 156 U. S. 432, 453 (1895). Our society's belief, reinforced over the centuries, that all are innocent until the state has proved them to be guilty, like the companion principle that guilt must be proved beyond a reasonable doubt, is "implicit in the concept of ordered liberty," *Palko* v. *Connecticut*, 302 U. S. 319, 325 (1937), and is established beyond legislative contravention in the Due Process Clause. See *Estelle* v. *Williams*, 425 U. S. 501, 503 (1976); *In re Winship*, 397 U. S. 358, 364 (1970). See also *Taylor* v. *Kentucky*, 436 U. S. 478, 483 (1978); *Kentucky* v. *Whorton*, 441 U. S. 786, 790 (1979) (Stewart, J., dissenting).

The statute now before us declares that persons who have been indicted may be detained if a judicial officer finds clear and convincing evidence that they pose a danger to individuals or to the community. The statute does not authorize the Government to imprison anyone it has evidence is dangerous; indictment is necessary. But let us suppose that a defendant is indicted and the Government shows by clear and convincing evidence that he is dangerous and should be detained pending a trial, at which trial the defendant is acquitted. May the Government continue to hold the defendant in detention based upon its showing that he is dangerous? The answer cannot be yes, for that would allow the Government to imprison someone for uncommitted crimes based upon "proof" not beyond a reasonable doubt. The result must therefore be that once the indictment has failed, detention

cannot continue. But our fundamental principles of justice declare that the defendant is as innocent on the day before his trial as he is on the morning after his acquittal. Under this statute an untried indictment somehow acts to permit a detention, based on other charges, which after an acquittal would be unconstitutional. The conclusion is inescapable that the indictment has been turned into evidence, if not that the defendant is guilty of the crime charged, then that left to his own devices he will soon be guilty of something else. "'If it suffices to accuse, what will become of the innocent?'" *Coffin* v. *United States*, *supra*, at 455 (quoting Ammianus Marcellinus, Rerum Gestarum Libri Qui Supersunt, L. XVIII, c. 1, A. D. 359).

To be sure, an indictment is not without legal consequences. It establishes that there is probable cause to believe that an offense was committed, and that the defendant committed it. Upon probable cause a warrant for the defendant's arrest may issue; a period of administrative detention may occur before the evidence of probable cause is presented to a neutral magistrate. See *Gerstein* v. *Pugh*, 420 U. S. 103 (1975). Once a defendant has been committed for trial he may be detained in custody if the magistrate finds that no conditions of release will prevent him from becoming a fugitive. But in this connection the charging instrument is evidence of nothing more than the fact that there will be a trial, and

> "release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty. Like the ancient practice of securing the oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the

presence of an accused." *Stack* v. *Boyle*, 342 U. S. 1, 4–5 (1951) (citation omitted).[6]

The finding of probable cause conveys power to try, and the power to try imports of necessity the power to assure that the processes of justice will not be evaded or obstructed.[7] "Pretrial detention to prevent future crimes against society at large, however, is not justified by any concern for holding a trial on the charges for which a defendant has been arrested." 794 F. 2d 64, 73 (CA2 1986) (quoting *United States* v. *Melendez-Carrion*, 790 F. 2d 984, 1002 (CA2 1986) (opinion of Newman, J.)). The detention purportedly authorized by this statute bears no relation to the Government's power to try charges supported by a finding of probable cause, and thus the interests it serves are outside the scope of interests which may be considered in weighing the excessiveness of bail under the Eighth Amendment.

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[6] The majority states that denial of bail in capital cases has traditionally been the rule rather than the exception. And this of course is so, for it has been the considered presumption of generations of judges that a defendant in danger of execution has an extremely strong incentive to flee. If in any particular case the presumed likelihood of flight should be made irrebuttable, it would in all probability violate the Due Process Clause. Thus what the majority perceives as an exception is nothing more than an example of the traditional operation of our system of bail.

[7] It is also true, as the majority observes, that the Government is entitled to assurance, by incarceration if necessary, that a defendant will not obstruct justice through destruction of evidence, procuring the absence or intimidation of witnesses, or subornation of perjury. But in such cases the Government benefits from no presumption that any particular defendant is likely to engage in activities inimical to the administration of justice, and the majority offers no authority for the proposition that bail has traditionally been denied *prospectively*, upon speculation that witnesses would be tampered with. Cf. *Carbo* v. *United States*, 82 S. Ct. 662, 7 L. Ed. 2d 769 (1962) (Douglas, J., in chambers) (bail pending appeal denied when more than 200 intimidating phone calls made to witness, who was also severely beaten).

It is not a novel proposition that the Bail Clause plays a vital role in protecting the presumption of innocence. Reviewing the application for bail pending appeal by members of the American Communist Party convicted under the Smith Act, 18 U. S. C. § 2385, Justice Jackson wrote:

> "Grave public danger is said to result from what [the defendants] may be expected to do, in addition to what they have done since their conviction. If I assume that defendants are disposed to commit every opportune disloyal act helpful to Communist countries, it is still difficult to reconcile with traditional American law the jailing of persons by the courts because of anticipated but as yet uncommitted crimes. Imprisonment to protect society from predicted but unconsummated offenses is . . . unprecedented in this country and . . . fraught with danger of excesses and injustice . . . ." *Williamson* v. *United States*, 95 L. Ed. 1379, 1382 (1950) (opinion in chambers) (footnote omitted).

As Chief Justice Vinson wrote for the Court in *Stack* v. *Boyle*, *supra:* "Unless th[e] right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." 342 U. S., at 4.

## IV

There is a connection between the peculiar facts of this case and the evident constitutional defects in the statute which the Court upholds today. Respondent Cafaro was originally incarcerated for an indeterminate period at the request of the Government, which believed (or professed to believe) that his release imminently threatened the safety of the community. That threat apparently vanished, from the Government's point of view, when Cafaro agreed to act as a covert agent of the Government. There could be no more eloquent demonstration of the coercive power of authority to imprison upon prediction, or of the dangers which the almost

inevitable abuses pose to the cherished liberties of a free society.

"It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people." *United States* v. *Rabinowitz*, 339 U. S. 56, 69 (1950) (Frankfurter, J., dissenting). Honoring the presumption of innocence is often difficult; sometimes we must pay substantial social costs as a result of our commitment to the values we espouse. But at the end of the day the presumption of innocence protects the innocent; the shortcuts we take with those whom we believe to be guilty injure only those wrongfully accused and, ultimately, ourselves.

Throughout the world today there are men, women, and children interned indefinitely, awaiting trials which may never come or which may be a mockery of the word, because their governments believe them to be "dangerous." Our Constitution, whose construction began two centuries ago, can shelter us forever from the evils of such unchecked power. Over 200 years it has slowly, through our efforts, grown more durable, more expansive, and more just. But it cannot protect us if we lack the courage, and the self-restraint, to protect ourselves. Today a majority of the Court applies itself to an ominous exercise in demolition. Theirs is truly a decision which will go forth without authority, and come back without respect.

I dissent.

JUSTICE STEVENS, dissenting.

There may be times when the Government's interest in protecting the safety of the community will justify the brief detention of a person who has not committed any crime, see *ante*, at 748–749, see also *United States* v. *Greene*, 497 F. 2d 1068, 1088–1089 (CA7 1974) (Stevens, J., dissenting).[1] To

[1] "If the evidence overwhelmingly establishes that a skyjacker, for example, was insane at the time of his act, and that he is virtually certain to

use Judge Feinberg's example, it is indeed difficult to accept the proposition that the Government is without power to detain a person when it is a virtual certainty that he or she would otherwise kill a group of innocent people in the immediate future. *United States* v. *Salerno*, 794 F. 2d 64, 77 (CA2 1986) (dissenting opinion). Similarly, I am unwilling to decide today that the police may never impose a limited curfew during a time of crisis. These questions are obviously not presented in this case, but they lurk in the background and preclude me from answering the question that is presented in as broad a manner as JUSTICE MARSHALL has. Nonetheless, I firmly agree with JUSTICE MARSHALL that the provision of the Bail Reform Act allowing pretrial detention on the basis of future dangerousness is unconstitutional. Whatever the answers are to the questions I have mentioned, it is clear to me that a pending indictment may not be given any weight in evaluating an individual's risk to the community or the need for immediate detention.

If the evidence of imminent danger is strong enough to warrant emergency detention, it should support that preventive measure regardless of whether the person has been charged, convicted, or acquitted of some other offense. In this case, for example, it is unrealistic to assume that the danger to the community that was present when respondents were at large did not justify their detention before they were indicted, but did require that measure the moment that the grand jury found probable cause to believe they had committed crimes in the past.[2] It is equally unrealistic to assume that the danger will vanish if a jury happens to acquit them.

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resume his violent behavior as soon as he is set free, must we then conclude that the only way to protect society from such predictable harm is to find an innocent man guilty of a crime he did not have the capacity to commit?" *United States* v. *Greene*, 497 F. 2d, at 1088.

[2] The Government's proof of future dangerousness was not dependent on any prediction that, as a result of the indictment, respondents posed a threat to potential witnesses or to the judicial system.

JUSTICE MARSHALL has demonstrated that the fact of indictment cannot, consistent with the presumption of innocence and the Eighth Amendment's Excessive Bail Clause, be used to create a special class, the members of which are, alone, eligible for detention because of future dangerousness.

Several factors combine to give me an uneasy feeling about the case the Court decides today. The facts set forth in Part I of JUSTICE MARSHALL's opinion strongly support the possibility that the Government is much more interested in litigating a "test case" than in resolving an actual controversy concerning respondents' threat to the safety of the community. Since Salerno has been convicted and sentenced on other crimes, there is no need to employ novel pretrial detention procedures against him. Cafaro's case is even more curious because he is apparently at large and was content to have his case argued by Salerno's lawyer even though his interests would appear to conflict with Salerno's. But if the merits must be reached, there is no answer to the arguments made in Parts II and III of JUSTICE MARSHALL's dissent. His conclusion, and not the Court's, is faithful to the "fundamental principles as they have been understood by the traditions of our people and our law." *Lochner* v. *New York*, 198 U. S. 45, 76 (1905) (Holmes, J., dissenting). Accordingly, I respectfully dissent.

# WATTS *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 1107, Misc. Decided April 21, 1969.

Petitioner's remark during political debate at small public gathering that if inducted into Army (which he vowed would never occur) and made to carry a rifle "the first man I want to get in my sights is L. B. J.," *held* to be crude political hyperbole which in light of its context and conditional nature did not constitute a knowing and willful threat against the President within the coverage of 18 U. S. C. § 871 (a).

Certiorari granted; 131 U. S. App. D. C. 125, 402 F. 2d 676, reversed and remanded.

*Joseph Forer* for petitioner.

*Solicitor General Griswold* for the United States.

*Ralph J. Temple, Melvin L. Wulf,* and *Lawrence Speiser* for the American Civil Liberties Union et al. as *amici curiae.*

PER CURIAM.

After a jury trial in the United States District Court for the District of Columbia, petitioner was convicted of violating a 1917 statute which prohibits any person from "knowingly and willfully . . . [making] any threat to take the life of or to inflict bodily harm upon the President of the United States . . . ." * The incident

*18 U. S. C. § 871 (a) provides:

"Whoever knowingly and willfully deposits for conveyance in the mail or for a delivery from any post office or by any letter carrier any letter, paper, writing, print, missive, or document containing any threat to take the life of or to inflict bodily harm upon the President of the United States, the President-elect, the Vice President or other officer next in the order of succession to the office

which led to petitioner's arrest occurred on August 27, 1966, during a public rally on the Washington Monument grounds. The crowd present broke up into small discussion groups and petitioner joined a gathering scheduled to discuss police brutality. Most of those in the group were quite young, either in their teens or early twenties. Petitioner, who himself was 18 years old, entered into the discussion after one member of the group suggested that the young people present should get more education before expressing their views. According to an investigator for the Army Counter Intelligence Corps who was present, petitioner responded: "They always holler at us to get an education. And now I have already received my draft classification as 1–A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L. B. J." "They are not going to make me kill my black brothers." On the basis of this statement, the jury found that petitioner had committed a felony by knowingly and willfully threatening the President. The United States Court of Appeals for the District of Columbia Circuit affirmed by a two-to-one vote. 131 U. S. App. D. C. 125, 402 F. 2d 676 (1968). We reverse.

At the close of the Government's case, petitioner's trial counsel moved for a judgment of acquittal. He contended that there was "absolutely no evidence on the basis of which the jury would be entitled to find that [petitioner] made a threat against the life of the Presi-

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of President of the United States, or the Vice President-elect, or knowingly and willfully otherwise makes any such threat against the President, President-elect, Vice President or other officer next in the order of succession to the office of President, or Vice President-elect, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

dent." He stressed the fact that petitioner's statement was made during a political debate, that it was expressly made conditional upon an event—induction into the Armed Forces—which petitioner vowed would never occur, and that both petitioner and the crowd laughed after the statement was made. He concluded, "Now actually what happened here in all this was a kind of very crude offensive method of stating a political opposition to the President. What he was saying, he says, I don't want to shoot black people because I don't consider them my enemy, and if they put a rifle in my hand it is the people that put the rifle in my hand, as symbolized by the President, who are my real enemy." We hold that the trial judge erred in denying this motion.

Certainly the statute under which petitioner was convicted is constitutional on its face. The Nation undoubtedly has a valid, even an overwhelming, interest in protecting the safety of its Chief Executive and in allowing him to perform his duties without interference from threats of physical violence. See H. R. Rep. No. 652, 64th Cong., 1st Sess. (1916). Nevertheless, a statute such as this one, which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech.

The judges in the Court of Appeals differed over whether or not the "willfullness" requirement of the statute implied that a defendant must have intended to carry out his "threat." Some early cases found the willfullness requirement met if the speaker voluntarily uttered the charged words with "an *apparent* determination to carry them into execution." *Ragansky* v. *United States,* 253 F. 643, 645 (C. A. 7th Cir. 1918) (emphasis supplied); cf. *Pierce* v. *United States,* 365 F. 2d 292 (C. A.

10th Cir. 1966). The majority below seemed to agree. Perhaps this interpretation is correct, although we have grave doubts about it. See the dissenting opinion below, 131 U. S. App. D. C., at 135–142, 402 F. 2d, at 686–693 (Wright, J.). But whatever the "willfullness" requirement implies, the statute initially requires the Government to prove a true "threat." We do not believe that the kind of political hyperbole indulged in by petitioner fits within that statutory term. For we must interpret the language Congress chose "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 270 (1964). The language of the political arena, like the language used in labor disputes, see *Linn* v. *United Plant Guard Workers of America,* 383 U. S. 53, 58 (1966), is often vituperative, abusive, and inexact. We agree with petitioner that his only offense here was "a kind of very crude offensive method of stating a political opposition to the President." Taken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted and the judgment of the Court of Appeals is reversed. The case is remanded with instructions that it be returned to the District Court for entry of a judgment of acquittal.

*It is so ordered.*

MR. JUSTICE STEWART would deny the petition for certiorari.

MR. JUSTICE WHITE dissents.

MR. JUSTICE DOUGLAS, concurring.

The charge in this case is of an ancient vintage.

The federal statute under which petitioner was convicted traces its ancestry to the Statute of Treasons (25 Edw. 3) which made it a crime to "compass or imagine the Death of . . . the King." Note, Threats to Take the Life of the President, 32 Harv. L. Rev. 724, 725 (1919). It is said that one Walter Walker, a 15th century keeper of an inn known as the "Crown," was convicted under the Statute of Treasons for telling his son: "Tom, if thou behavest thyself well, I will make thee heir to the CROWN." He was found guilty of compassing and imagining the death of the King, hanged, drawn, and quartered. 1 J. Campbell, Lives of the Chief Justices of England 151 (1873).

In the time of Edward IV, one Thomas Burdet who predicted that the king would "soon die, with a view to alienate the affections" of the people was indicted for "compassing and imagining of the death of the King," 79 Eng. Rep. 706 (1477)—the crime of constructive treason [1] with which the old reports are filled.

[1] The prosecution in those cases laid bare to the juries that the treasonous thoughts were the heart of the matter; "the original of his Treasons proceeded from the imagination of his heart; which imagination was in itself High-Treason, albeit the same proceeded not to any overt fact: and the heart being possessed with the abundance of his traitorous imagination, and not being able so to contain itself, burst forth in vile and traitorous Speeches, and from thence to horrible and heinous actions." *Trial of Sir John Perrot*, 1 How. St. Tr. 1315, 1318 (1592). "[T]he high treason charged, is the compassing or imagining (in other words, the intending or designing) the death of the king; I mean his NATURAL DEATH; which being a hidden operation of the mind, an overt act is any thing which legally proves the existence of such traitorous design and intention—I say that the design against the king's natural life, is the high treason under the first branch of the statute; and whatever is evidence, which may be legally laid before a jury to judge of the traitorous intention, is a legal overt act; because an overt act is

In the time of Charles II, one Edward Brownlow was indicted "for speaking these words, that he wished all the gentry in the land would kill one another, so that the comminalty might live the better." 3 Middlesex County Rec. 326 (1888). In the same year (1662) one Robert Thornell was indicted for saying "that if the Kinge did side with the Bishops, the divell take Kinge and the Bishops too." *Id.*, at 327.

While our Alien and Sedition Laws were in force, John Adams, President of the United States, en route from Philadelphia, Pennsylvania, to Quincy, Massachusetts, stopped in Newark, New Jersey, where he was greeted by a crowd and by a committee that saluted him by firing a cannon.

A bystander said, "There goes the President and they are firing at his ass." Luther Baldwin was indicted for replying that he did not care "if they fired through his ass." He was convicted in the federal court for speaking "sedicious words tending to defame the President and Government of the United States" and fined, assessed court costs and expenses, and committed to jail until the fine and fees were paid. See J. Smith, Freedom's Fetters 270–274 (1956).

The Alien and Sedition Laws constituted one of our sorriest chapters; and I had thought we had done with them forever.[2]

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nothing but legal evidence embodied upon the record." *Trial of Thomas Hardy*, 24 How. St. Tr. 199, 894 (1794). And see 84 Eng. Rep. 1057 (1708).

For a discussion of the adequacy of mere words as overt acts see 3 W. Holdsworth, History of English Law 293 (1927).

[2] "In the Sedition Act cases, the tendency of words to produce acts against the peace and security of the community was stretched to its utmost latitude. Likewise, judges and juries, in their willingness to presume evil intent on the part of Republican writers, largely nullified the safeguards erected by the Sedition Act itself. Criticism of the President and Congress—in which every American indulges as his birthright—was severely punished; yet this practice

Yet the present statute has hardly fared better. "Like the Statute of Treasons, section 871 was passed in a 'relatively calm peacetime spring,' but has been construed under circumstances when intolerance for free speech was much greater than it normally might be." Note, Threatening the President: Protected Dissenter or Political Assassin, 57 Geo. L. J. 553, 570 (1969). Convictions under 18 U. S. C. § 871 have been sustained for displaying posters urging passersby to "hang [President] Roosevelt." *United States* v. *Apel,* 44 F. Supp. 592, 593 (D. C. N. D. Ill. 1942); for declaring that "President Wilson ought to be killed. It is a wonder some one has not done it already. If I had an opportunity, I would do it myself." *United States* v. *Stickrath,* 242 F. 151, 152 (D. C. S. D. Ohio 1917); for declaring that "Wilson is a wooden-headed son of a bitch. I wish Wilson was in hell, and if I had the power I would put him there," *Clark* v. *United States,* 250 F. 449 (C. A. 5th Cir. 1918). In sustaining an indictment under the statute against a man who indicated that he would enjoy shooting President Wilson if he had the chance, the trial court explained the thrust of § 871:

> "The purpose of the statute was undoubtedly, not only the protection of the President, but also the prohibition of just such statements as those alleged in this indictment. The expression of such direful intentions and desires, not only indicates a spirit of disloyalty to the nation bordering upon treason, but is, in a very real sense, a menace to the peace and safety of the country. . . . It arouses resentment

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manifestly has only a remote tendency to injure and bring into contempt the government of the United States. In short, much that has become commonplace in American political life was put under the ban by the Federalist lawmakers and judges of 1798." J. Miller, Crisis in Freedom 233 (1951).

> and concern on the part of patriotic citizens." *United States* v. *Jasick*, 252 F. 931, 933 (D. C. E. D. Mich. 1918).

Suppression of speech as an effective police measure is an old, old device, outlawed by our Constitution.

MR. JUSTICE FORTAS, with whom MR. JUSTICE HARLAN joins, dissenting.

The Court holds, without hearing, that this statute is constitutional and that it is here wrongly applied. Neither of these rulings should be made without hearing, even if we assume that they are correct.

Perhaps this is a trivial case because of its peculiar facts and because the petitioner was merely given a suspended sentence. That does not justify the Court's action. It should induce us to deny certiorari, not to decide the case on its merits and to adjudicate the difficult questions that it presents.

# CALIFORNIA MOTOR TRANSPORT CO. ET AL. *v.* TRUCKING UNLIMITED ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 70-92. Argued November 10, 1971—Decided January 13, 1972

Respondent highway carriers filed this civil action under § 4 of the Clayton Act for injunctive relief and damages against petitioner highway carriers charging that petitioners conspired to monopolize the transportation of goods by instituting state and federal proceedings to resist and defeat applications by respondents to acquire, transfer, or register operating rights. Respondents alleged that the purpose of the conspiracy was "putting their competitors . . . out of business, of weakening such competitors, of destroying, eliminating and weakening existing and potential competition, and of monopolizing the highway common carrier business in California and elsewhere," and deterring respondents from having free and unlimited access to the agencies and the courts. The District Court dismissed the complaint for failure to state a cause of action but the Court of Appeals reversed. *Held:* While any carrier has the right of access to administrative agencies and courts to defeat applications of competitors for certificates as highway carriers, and its purpose to eliminate an applicant as a competitor may be implicit in such opposition, its First Amendment rights are not immunized from regulation when they are used as an integral part of conduct violative of the antitrust laws. If the allegations that petitioners combined to harass and deter respondents from having "free and unlimited access" to agencies and courts, and to defeat that right by massive, concerted, and purposeful group activities are established as facts, a violation of the antitrust laws will have been demonstrated, and it is immaterial that the means used in violation may be lawful. Pp. 509-516.

432 F. 2d 755, affirmed and remanded for trial.

DOUGLAS, J., wrote the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, and BLACKMUN, JJ., joined. STEWART, J., filed an opinion concurring in the judgment, in which BRENNAN, J., joined, *post*, p. 516. POWELL and REHNQUIST, JJ., took no part in the consideration or decision of the case.

*Boris H. Lakusta* argued the cause for petitioners. With him on the briefs were *W. D. Benson, John MacDonald Smith,* and *Daniel H. Benson.*

*Michael N. Khourie* argued the cause and filed a brief for respondents.

*Dennis N. Garvey* filed a brief for Landmarks Holding Corp. et al. as *amici curiae.*

Opinion of the Court by MR. JUSTICE DOUGLAS, announced by MR. CHIEF JUSTICE BURGER.

This is a civil suit under § 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 15, for injunctive relief and damages instituted by respondents, who are highway carriers operating in California, against petitioners, who are also highway carriers operating within, into, and from California. Respondents and petitioners are, in other words, competitors. The charge is that the petitioners conspired to monopolize trade and commerce in the transportation of goods in violation of the antitrust laws. The conspiracy alleged is a concerted action by petitioners to institute state and federal proceedings to resist and defeat applications by respondents to acquire operating rights or to transfer or register those rights. These activities, it is alleged, extend to rehearings and to reviews or appeals from agency or court decisions on these matters.

The District Court dismissed the complaint for failure to state a cause of action, 1967 Trade Cas. ¶ 72,298. The Court of Appeals reversed, 432 F. 2d 755. The case is here on a petition for a writ of certiorari, which we granted. 402 U. S. 1008.

The present case is akin to *Eastern Railroad Conference* v. *Noerr Motor Freight,* 365 U. S. 127, where a group of trucking companies sued a group of railroads to restrain them from an alleged conspiracy to monopolize

the long-distance freight business in violation of the antitrust laws and to obtain damages. We held that no cause of action was alleged insofar as it was predicated upon mere attempts to influence the Legislative Branch for the passage of laws or the Executive Branch for their enforcement. We rested our decision on two grounds:

> (1) "In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act." *Id.*, at 137.
>
> (2) "The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." *Id.*, at 138.

We followed that view in *United Mine Workers* v. *Pennington*, 381 U. S. 657, 669–671.

The same philosophy governs the approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive) and to courts, the third branch of Government. Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition. See *Johnson* v. *Avery*, 393 U. S. 483, 485; *Ex parte Hull*, 312 U. S. 546, 549.

We conclude that it would be destructive of rights of association and of petition to hold that groups with

common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests *vis-à-vis* their competitors.

We said, however, in *Noerr* that there may be instances where the alleged conspiracy "is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." 365 U. S., at 144.

In that connection the complaint in the present case alleged that the aim and purpose of the conspiracy was "putting their competitors, including plaintiff, out of business, of weakening such competitors, of destroying, eliminating and weakening existing and potential competition, and of monopolizing the highway common carriage business in California and elsewhere."

More critical are other allegations, which are too lengthy to quote, and which elaborate on the "sham" theory by stating that the power, strategy, and resources of the petitioners were used to harass and deter respondents in their use of administrative and judicial proceedings so as to deny them "free and unlimited access" to those tribunals. The result, it is alleged, was that the machinery of the agencies and the courts was effectively closed to respondents, and petitioners indeed became "the regulators of the grants of rights, transfers and registrations" to respondents—thereby depleting and diminishing the value of the businesses of respondents and aggrandizing petitioners' economic and monopoly power. See Note, 57 Calif. L. Rev. 518 (1969).

Petitioners rely on our statement in *Pennington* that "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose." 381 U. S., at 670. In the present case, however,

the allegations are not that the conspirators sought "to influence public officials," but that they sought to bar their competitors from meaningful access to adjudicatory tribunals and so to usurp that decisionmaking process. It is alleged that petitioners "instituted the proceedings and actions . . . with or without probable cause, and regardless of the merits of the cases." The nature of the views pressed does not, of course, determine whether First Amendment rights may be invoked; but they may bear upon a purpose to deprive the competitors of meaningful access to the agencies and courts. As stated in the opinion concurring in the judgment, such a purpose or intent, if shown, would be "to discourage and ultimately to prevent the respondents from invoking" the processes of the administrative agencies and courts and thus fall within the exception to *Noerr*.

The political campaign operated by the railroads in *Noerr* to obtain legislation crippling truckers employed deception and misrepresentation and unethical tactics. We said:

> "Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities, a caution which has been reflected in the decisions of this Court interpreting such legislation. All of this caution would go for naught if we permitted an extension of the Sherman Act to regulate activities of that nature simply because those activities have a commercial impact and involve conduct that can be termed unethical." 365 U. S., at 141.

Yet unethical conduct in the setting of the adjudicatory process often results in sanctions. Perjury of witnesses is one example. Use of a patent obtained by fraud to exclude a competitor from the market may involve a violation of the antitrust laws, as we held in *Walker*

*Process Equipment* v. *Food Machinery & Chemical Corp.*, 382 U. S. 172, 175–177. Conspiracy with a licensing authority to eliminate a competitor may also result in an antitrust transgression. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 707; *Harman* v. *Valley National Bank*, 339 F. 2d 564 (CA9 1964). Similarly, bribery of a public purchasing agent may constitute a violation of § 2 (c) of the Clayton Act, as amended by the Robinson-Patman Act. *Rangen, Inc.* v. *Sterling Nelson & Sons*, 351 F. 2d 851 (CA9 1965).

There are many other forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations. Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process. Opponents before agencies or courts often think poorly of the other's tactics, motions, or defenses and may readily call them baseless. One claim, which a court or agency may think baseless, may go unnoticed; but a pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused. That may be a difficult line to discern and draw. But once it is drawn, the case is established that abuse of those processes produced an illegal result, *viz.*, effectively barring respondents from access to the agencies and courts. Insofar as the administrative or judicial processes are involved, actions of that kind cannot acquire immunity by seeking refuge under the umbrella of "political expression."

Petitioners, of course, have the right of access to the agencies and courts to be heard on applications sought by competitive highway carriers. That right, as indicated, is part of the right of petition protected by the First Amendment. Yet that does not necessarily give them immunity from the antitrust laws.

It is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute. *Giboney* v. *Empire Storage Co.*, 336 U. S. 490. In that case Missouri enacted a statute banning secondary boycotts and we sustained an injunction against picketing to enforce the boycott, saying:

> "It is true that the agreements and course of conduct here were as in most instances brought about through speaking or writing. But it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed. . . . Such an expansive interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society." 336 U. S., at 502.

In *Associated Press* v. *United States*, 326 U. S. 1, we held that the Associated Press was not immune from the antitrust laws by reason of the fact that the press is under the shelter of the First Amendment. We said:

> "Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the

> First Amendment does not sanction repression of that freedom by private interests." *Id.*, at 20.

Accord, *Citizen Publishing Co.* v. *United States*, 394 U. S. 131, 139–140. Cf. *Eastern States Lumber Assn.* v. *United States*, 234 U. S. 600.

The rationale of those cases, when applied to the instant controversy, makes the following conclusions clear: (1) that any carrier has the right of access to agencies and courts, within the limits, of course, of their prescribed procedures, in order to defeat applications of its competitors for certificates as highway carriers; and (2) that its purpose to eliminate an applicant as a competitor by denying him free and meaningful access to the agencies and courts may be implicit in that opposition.

First Amendment rights may not be used as the means or the pretext for achieving "substantive evils" (see *NAACP* v. *Button*, 371 U. S. 415, 444) which the legislature has the power to control. Certainly the constitutionality of the antitrust laws is not open to debate. A combination of entrepreneurs to harass and deter their competitors from having "free and unlimited access" to the agencies and courts, to defeat that right by massive, concerted, and purposeful activities of the group are ways of building up one empire and destroying another. As stated in the opinion concurring in the judgment, that is the essence of those parts of the complaint to which we refer. If these facts are proved, a violation of the antitrust laws has been established. If the end result is unlawful, it matters not that the means used in violation may be lawful.

What the proof will show is not known, for the District Court granted the motion to dismiss the complaint. We must, of course, take the allegations of the complaint at face value for the purposes of that motion. *Walker*

*Process Equipment* v. *Food Machinery & Chemical Corp.*, 382 U. S., at 174–175. On their face the above-quoted allegations come within the "sham" exception in the *Noerr* case, as adapted to the adjudicatory process.

Accordingly we affirm the Court of Appeals and remand the case for trial.

*So ordered.*

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN joins, concurring in the judgment.

In the *Noerr* case [1] this Court held, in a unanimous opinion written by Mr. Justice Black, that a conspiracy by railroads to influence legislative and executive action in order to destroy the competition of truckers in the long-haul freight business was wholly immune from the antitrust laws.[2] This conclusion, we held, was required in order to preserve the informed operation of governmental processes and to protect the right of petition guaranteed by the First Amendment.[3] Today the Court retreats from *Noerr*, and in the process tramples upon important First Amendment values. For that reason I cannot join the Court's opinion.

In *Noerr* the defendants were joined together in an effort to induce legislative and executive action. Here,

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[1] *Eastern Railroad Conference* v. *Noerr Motor Freight*, 365 U. S. 127.

[2] See also *United Mine Workers* v. *Pennington*, 381 U. S. 657, 669–671.

[3] This conclusion, the Court held, was a corollary of our decisions in *United States* v. *Rock Royal Co-operative*, 307 U. S. 533, and *Parker* v. *Brown*, 317 U. S. 341, holding that when a monopoly or restraint of trade is the result of valid governmental action, there cannot be an antitrust violation.

so the complaint alleges, the defendants (petitioners) have joined to induce administrative and judicial action. The difference in type of governmental body might make a difference in the applicability of the antitrust laws if the petitioners had made misrepresentations of fact or law to these tribunals, or had engaged in perjury, or fraud, or bribery.[4] But, contrary to implications in the Court's opinion, there are in this case no allegations whatever of any such conduct on the part of the petitioners. And, in the absence of such conduct, I can see no difference, so far as the antitrust laws and the First Amendment are concerned, between trying to influence executive and legislative bodies and trying to influence administrative and judicial bodies. *NAACP* v. *Button*, 371 U. S. 415; *Brotherhood of Railroad Trainmen* v. *Virginia Bar*, 377 U. S. 1; *United Mine Workers* v. *Illinois State Bar Assn.*, 389 U. S. 217; *United Transportation Union* v. *State Bar of Michigan*, 401 U. S. 576.

The Court concedes that the petitioners' "right of access to the agencies and courts to be heard on applications sought by competitive highway carriers . . . is part of the right of petition protected by the First Amendment." Yet, says the Court, their joint agreement to exercise that right "does not necessarily give them immunity from the antitrust laws." *Ante*, at 513. It is difficult to imagine a statement more totally at odds with *Noerr*. For what that case explicitly held is that the joint exercise of the constitutional right of petition *is* given immunity from the antitrust laws.

While disagreeing with the Court's opinion, I would

[4] In *Noerr*, the Court emphasized that the defendants' "unethical" conduct did not affect their antitrust immunity for jointly exerting pressure on the Legislative and Executive Branches, 365 U. S., at 141. See, however, *Walker Process Equipment* v. *Food Machinery & Chemical Corp.*, 382 U. S. 172.

nonetheless remand this case to the District Court for trial. The complaint contains allegations that the petitioners have:

> 1. *Agreed* jointly to finance and to carry out and publicize a consistent, systematic and uninterrupted program of opposing 'with or without probable cause and regardless of the merits' every application, with insignificant exceptions, for additional operating rights or for the registration or transfer of operating rights, before the California PUC, the ICC, and the courts on appeal.
>
> 2. *Carried out* such agreement (a) by appearing as protestants in all proceedings instituted by plaintiffs and others in like position or by instituting complaints in opposition to applications or transfers or registrations; (b) by establishing a trust fund to finance the foregoing, consisting of contributions monthly in amounts proportionate to each defendant's annual gross income; (c) by publicizing and making known to plaintiffs and others in like position the foregoing program.

Under these allegations, liberally construed, the respondents are entitled to prove that the real *intent* of the conspirators was not to invoke the processes of the administrative agencies and courts, but to discourage and ultimately to prevent the respondents from invoking those processes. Such an intent would make the conspiracy "an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." *Eastern Railroad Conference* v. *Noerr Motor Freight,* 365 U. S., at 144.

It is only on this basis that I concur in the judgment of the Court.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

# SUPREME COURT OF THE UNITED STATES

Syllabus

## ELONIS *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 13–983. Argued December 1, 2014—Decided June 1, 2015

After his wife left him, petitioner Anthony Douglas Elonis, under the pseudonym "Tone Dougie," used the social networking Web site Facebook to post self-styled rap lyrics containing graphically violent language and imagery concerning his wife, co-workers, a kindergarten class, and state and federal law enforcement. These posts were often interspersed with disclaimers that the lyrics were "fictitious" and not intended to depict real persons, and with statements that Elonis was exercising his First Amendment rights. Many who knew him saw his posts as threatening, however, including his boss, who fired him for threatening co-workers, and his wife, who sought and was granted a state court protection-from-abuse order against him.

When Elonis's former employer informed the Federal Bureau of Investigation of the posts, the agency began monitoring Elonis's Facebook activity and eventually arrested him. He was charged with five counts of violating 18 U. S. C. §875(c), which makes it a federal crime to transmit in interstate commerce "any communication containing any threat . . . to injure the person of another." At trial, Elonis requested a jury instruction that the Government was required to prove that he intended to communicate a "true threat." Instead, the District Court told the jury that Elonis could be found guilty if a reasonable person would foresee that his statements would be interpreted as a threat. Elonis was convicted on four of the five counts and renewed his jury instruction challenge on appeal. The Third Circuit affirmed, holding that Section 875(c) requires only the intent to communicate words that the defendant understands, and that a reasonable person would view as a threat.

*Held*: The Third Circuit's instruction, requiring only negligence with respect to the communication of a threat, is not sufficient to support a

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conviction under Section 875(c). Pp. 7–17.

(a) Section 875(c) does not indicate whether the defendant must intend that the communication contain a threat, and the parties can show no indication of a particular mental state requirement in the statute's text. Elonis claims that the word "threat," by definition, conveys the intent to inflict harm. But common definitions of "threat" speak to what the statement conveys—not to the author's mental state. The Government argues that the express "intent to extort" requirements in neighboring Sections 875(b) and (d) should preclude courts from implying an unexpressed "intent to threaten" requirement in Section 875(c). The most that can be concluded from such a comparison, however, is that Congress did not mean to confine Section 875(c) to crimes of extortion, not that it meant to exclude a mental state requirement. Pp. 7–9.

(b) The Court does not regard "mere omission from a criminal enactment of any mention of criminal intent" as dispensing with such a requirement. *Morissette* v. *United States*, 342 U. S. 246, 250. This rule of construction reflects the basic principle that "wrongdoing must be conscious to be criminal," and that a defendant must be "blameworthy in mind" before he can be found guilty. *Id.,* at 252. The "general rule" is that a guilty mind is "a necessary element in the indictment and proof of every crime." *United States* v. *Balint*, 258 U. S. 250, 251. Thus, criminal statutes are generally interpreted "to include broadly applicable scienter requirements, even where the statute . . . does not contain them." *United States* v. *X-Citement Video, Inc.*, 513 U. S. 64, 70. This does not mean that a defendant must know that his conduct is illegal, but a defendant must have knowledge of "the facts that make his conduct fit the definition of the offense." *Staples* v. *United States*, 511 U. S. 600, 608, n. 3. Federal criminal statutes that are silent on the required mental state should be read to include "only that *mens rea* which is necessary to separate" wrongful from innocent conduct. *Carter* v. *United States*, 530 U. S. 255, 269. In some cases, a general requirement that a defendant act knowingly is sufficient, but where such a requirement "would fail to protect the innocent actor," the statute "would need to be read to require . . . specific intent." *Ibid.* Pp. 9–13.

(c) The "presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct." *X-Citement Video*, 513 U. S.*,* at 72. In the context of Section 875(c), that requires proof that a communication was transmitted and that it contained a threat. And because "the crucial element separating legal innocence from wrongful conduct," *id.,* at 73, is the threatening nature of the communication, the mental state requirement must apply to the fact that the communication contains a

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threat. Elonis's conviction was premised solely on how his posts would be viewed by a reasonable person, a standard feature of civil liability in tort law inconsistent with the conventional criminal conduct requirement of "awareness of some wrongdoing," *Staples*, 511 U. S., at 606–607. This Court "ha[s] long been reluctant to infer that a negligence standard was intended in criminal statutes." *Rogers* v. *United States*, 422 U. S. 35, 47 (Marshall, J., concurring). And the Government fails to show that the instructions in this case required more than a mental state of negligence. *Hamling* v. *United States*, 418 U. S. 87, distinguished. Section 875(c)'s mental state requirement is satisfied if the defendant transmits a communication for the purpose of issuing a threat or with knowledge that the communication will be viewed as a threat. The Court declines to address whether a mental state of recklessness would also suffice. Given the disposition here, it is unnecessary to consider any First Amendment issues. Pp. 13–17.

730 F. 3d. 321, reversed and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which SCALIA, KENNEDY, GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed an opinion concurring in part and dissenting in part. THOMAS, J., filed a dissenting opinion.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

# SUPREME COURT OF THE UNITED STATES

No. 13–983

ANTHONY DOUGLAS ELONIS, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[June 1, 2015]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Federal law makes it a crime to transmit in interstate commerce "any communication containing any threat . . . to injure the person of another." 18 U. S. C. §875(c). Petitioner was convicted of violating this provision under instructions that required the jury to find that he communicated what a reasonable person would regard as a threat. The question is whether the statute also requires that the defendant be aware of the threatening nature of the communication, and—if not—whether the First Amendment requires such a showing.

## I

### A

Anthony Douglas Elonis was an active user of the social networking Web site Facebook. Users of that Web site may post items on their Facebook page that are accessible to other users, including Facebook "friends" who are notified when new content is posted. In May 2010, Elonis's wife of nearly seven years left him, taking with her their two young children. Elonis began "listening to more vio-

lent music" and posting self-styled "rap" lyrics inspired by the music. App. 204, 226. Eventually, Elonis changed the user name on his Facebook page from his actual name to a rap-style nom de plume, "Tone Dougie," to distinguish himself from his "on-line persona." *Id.*, at 249, 265. The lyrics Elonis posted as "Tone Dougie" included graphically violent language and imagery. This material was often interspersed with disclaimers that the lyrics were "fictitious," with no intentional "resemblance to real persons." *Id.,* at 331, 329. Elonis posted an explanation to another Facebook user that "I'm doing this for me. My writing is therapeutic." *Id.,* at 329; see also *id.*, at 205 (testifying that it "helps me to deal with the pain").

Elonis's co-workers and friends viewed the posts in a different light. Around Halloween of 2010, Elonis posted a photograph of himself and a co-worker at a "Halloween Haunt" event at the amusement park where they worked. In the photograph, Elonis was holding a toy knife against his co-worker's neck, and in the caption Elonis wrote, "I wish." *Id.,* at 340. Elonis was not Facebook friends with the co-worker and did not "tag" her, a Facebook feature that would have alerted her to the posting. *Id.,* at 175; Brief for Petitioner 6, 9. But the chief of park security was a Facebook "friend" of Elonis, saw the photograph, and fired him. App. 114–116; Brief for Petitioner 9.

In response, Elonis posted a new entry on his Facebook page:

> "Moles! Didn't I tell y'all I had several? Y'all sayin' I had access to keys for all the f***in' gates. That I have sinister plans for all my friends and must have taken home a couple. Y'all think it's too dark and foggy to secure your facility from a man as mad as me? You see, even without a paycheck, I'm still the main attraction. Whoever thought the Halloween Haunt could be so f***in' scary?" App. 332.

This post became the basis for Count One of Elonis's subsequent indictment, threatening park patrons and employees.

Elonis's posts frequently included crude, degrading, and violent material about his soon-to-be ex-wife. Shortly after he was fired, Elonis posted an adaptation of a satirical sketch that he and his wife had watched together. *Id.,* at 164–165, 207. In the actual sketch, called "It's Illegal to Say . . . ," a comedian explains that it is illegal for a person to say he wishes to kill the President, but not illegal to explain that it is illegal for him to say that. When Elonis posted the script of the sketch, however, he substituted his wife for the President. The posting was part of the basis for Count Two of the indictment, threatening his wife:

> "Hi, I'm Tone Elonis.
> Did you know that it's illegal for me to say I want to kill my wife? . . .
> It's one of the only sentences that I'm not allowed to say. . . .
> Now it was okay for me to say it right then because I was just telling you that it's illegal for me to say I want to kill my wife. . . .
> Um, but what's interesting is that it's very illegal to say I really, really think someone out there should kill my wife. . . .
> But not illegal to say with a mortar launcher.
> Because that's its own sentence. . . .
> I also found out that it's incredibly illegal, extremely illegal to go on Facebook and say something like the best place to fire a mortar launcher at her house would be from the cornfield behind it because of easy access to a getaway road and you'd have a clear line of sight through the sun room. . . .
> Yet even more illegal to show an illustrated diagram. [diagram of the house]. . . ." *Id.,* at 333.

The details about the home were accurate. *Id.,* at 154. At the bottom of the post, Elonis included a link to the video of the original skit, and wrote, "Art is about pushing limits. I'm willing to go to jail for my Constitutional rights. Are you?" *Id.,* at 333.

After viewing some of Elonis's posts, his wife felt "extremely afraid for [her] life." *Id.,* at 156. A state court granted her a three-year protection-from-abuse order against Elonis (essentially, a restraining order). *Id.,* at 148–150. Elonis referred to the order in another post on his "Tone Dougie" page, also included in Count Two of the indictment:

> "Fold up your [protection-from-abuse order] and put it in your pocket
> Is it thick enough to stop a bullet?
> Try to enforce an Order
> that was improperly granted in the first place
> Me thinks the Judge needs an education
> on true threat jurisprudence
> And prison time'll add zeros to my settlement . . .
> And if worse comes to worse
> I've got enough explosives
> to take care of the State Police and the Sheriff's Department." *Id.,* at 334.

At the bottom of this post was a link to the Wikipedia article on "Freedom of speech." *Ibid.* Elonis's reference to the police was the basis for Count Three of his indictment, threatening law enforcement officers.

That same month, interspersed with posts about a movie Elonis liked and observations on a comedian's social commentary, *id.,* at 356–358, Elonis posted an entry that gave rise to Count Four of his indictment:

> "That's it, I've had about enough
> I'm checking out and making a name for myself
> Enough elementary schools in a ten mile radius

> to initiate the most heinous school shooting ever imagined
> And hell hath no fury like a crazy man in a Kindergarten class
> The only question is . . . which one?" *Id.,* at 335.

Meanwhile, park security had informed both local police and the Federal Bureau of Investigation about Elonis's posts, and FBI Agent Denise Stevens had created a Facebook account to monitor his online activity. *Id.,* at 49–51, 125. After the post about a school shooting, Agent Stevens and her partner visited Elonis at his house. *Id.,* at 65–66. Following their visit, during which Elonis was polite but uncooperative, Elonis posted another entry on his Facebook page, called "Little Agent Lady," which led to Count Five:

> "You know your s***'s ridiculous
> when you have the FBI knockin' at yo' door
> Little Agent lady stood so close
> Took all the strength I had not to turn the b**** ghost
> Pull my knife, flick my wrist, and slit her throat
> Leave her bleedin' from her jugular in the arms of her partner
> [laughter]
> So the next time you knock, you best be serving a warrant
> And bring yo' SWAT and an explosives expert while you're at it
> Cause little did y'all know, I was strapped wit' a bomb
> Why do you think it took me so long to get dressed with no shoes on?
> I was jus' waitin' for y'all to handcuff me and pat me down
> Touch the detonator in my pocket and we're all goin'
> [BOOM!]
> Are all the pieces comin' together?
> S***, I'm just a crazy sociopath

> that gets off playin' you stupid f***s like a fiddle
> And if y'all didn't hear, I'm gonna be famous
> Cause I'm just an aspiring rapper who likes the attention
> who happens to be under investigation for terrorism
> cause y'all think I'm ready to turn the Valley into Fallujah
> But I ain't gonna tell you which bridge is gonna fall into which river or road
> And if you really believe this s***
> I'll have some bridge rubble to sell you tomorrow
> [BOOM!][BOOM!][BOOM!]" *Id.,* at 336.

B

A grand jury indicted Elonis for making threats to injure patrons and employees of the park, his estranged wife, police officers, a kindergarten class, and an FBI agent, all in violation of 18 U. S. C. §875(c). App. 14–17. In the District Court, Elonis moved to dismiss the indictment for failing to allege that he had intended to threaten anyone. The District Court denied the motion, holding that Third Circuit precedent required only that Elonis "intentionally made the communication, not that he intended to make a threat." App. to Pet. for Cert. 51a. At trial, Elonis testified that his posts emulated the rap lyrics of the well-known performer Eminem, some of which involve fantasies about killing his ex-wife. App. 225. In Elonis's view, he had posted "nothing . . . that hasn't been said already." *Id.,* at 205. The Government presented as witnesses Elonis's wife and co-workers, all of whom said they felt afraid and viewed Elonis's posts as serious threats. See, *e.g., id.,* at 153, 158.

Elonis requested a jury instruction that "the government must prove that he intended to communicate a true threat." *Id.,* at 21. See also *id.,* at 267–269, 303. The District Court denied that request. The jury instructions

instead informed the jury that

> "A statement is a true threat when a defendant intentionally makes a statement in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily injury or take the life of an individual." *Id.,* at 301.

The Government's closing argument emphasized that it was irrelevant whether Elonis intended the postings to be threats—"it doesn't matter what he thinks." *Id.,* at 286. A jury convicted Elonis on four of the five counts against him, acquitting only on the charge of threatening park patrons and employees. *Id.,* at 309. Elonis was sentenced to three years, eight months' imprisonment and three years' supervised release.

Elonis renewed his challenge to the jury instructions in the Court of Appeals, contending that the jury should have been required to find that he intended his posts to be threats. The Court of Appeals disagreed, holding that the intent required by Section 875(c) is only the intent to communicate words that the defendant understands, and that a reasonable person would view as a threat. 730 F. 3d 321, 332 (CA3 2013).

We granted certiorari. 573 U. S. ___ (2014).

## II

### A

An individual who "transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another" is guilty of a felony and faces up to five years' imprisonment. 18 U. S. C. §875(c). This statute requires that a communication be transmitted and that the com-

munication contain a threat. It does not specify that the defendant must have any mental state with respect to these elements. In particular, it does not indicate whether the defendant must intend that his communication contain a threat.

Elonis argues that the word "threat" itself in Section 875(c) imposes such a requirement. According to Elonis, every definition of "threat" or "threaten" conveys the notion of an intent to inflict harm. Brief for Petitioner 23. See *United States* v. *Jeffries*, 692 F. 3d 473, 483 (CA6 2012) (Sutton, J., *dubitante*). *E.g.*, 11 Oxford English Dictionary 353 (1933) ("to declare (usually conditionally) one's intention of inflicting injury upon"); Webster's New International Dictionary 2633 (2d ed. 1954) ("*Law*, specif., an expression of an intention to inflict loss or harm on another by illegal means"); Black's Law Dictionary 1519 (8th ed. 2004) ("A communicated intent to inflict harm or loss on another").

These definitions, however, speak to what the statement conveys—not to the mental state of the author. For example, an anonymous letter that says "I'm going to kill you" is "an expression of an intention to inflict loss or harm" regardless of the author's intent. A victim who receives that letter in the mail has received a threat, even if the author believes (wrongly) that his message will be taken as a joke.

For its part, the Government argues that Section 875(c) should be read in light of its neighboring provisions, Sections 875(b) and 875(d). Those provisions also prohibit certain types of threats, but expressly include a mental state requirement of an "intent to extort." See 18 U. S. C. §875(b) (proscribing threats to injure or kidnap made "with intent to extort"); §875(d) (proscribing threats to property or reputation made "with intent to extort"). According to the Government, the express "intent to extort" requirements in Sections 875(b) and (d) should pre-

clude courts from implying an unexpressed "intent to threaten" requirement in Section 875(c). See *Russello* v. *United States*, 464 U. S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

The Government takes this *expressio unius est exclusio alterius* canon too far. The fact that Congress excluded the requirement of an "intent to extort" from Section 875(c) is strong evidence that Congress did not mean to confine Section 875(c) to crimes of extortion. But that does not suggest that Congress, at the same time, also meant to exclude a requirement that a defendant act with a certain mental state in communicating a threat. The most we can conclude from the language of Section 875(c) and its neighboring provisions is that Congress meant to proscribe a broad class of threats in Section 875(c), but did not identify what mental state, if any, a defendant must have to be convicted.

In sum, neither Elonis nor the Government has identified any indication of a particular mental state requirement in the text of Section 875(c).

B

The fact that the statute does not specify any required mental state, however, does not mean that none exists. We have repeatedly held that "mere omission from a criminal enactment of any mention of criminal intent" should not be read "as dispensing with it." *Morissette* v. *United States*, 342 U. S. 246, 250 (1952). This rule of construction reflects the basic principle that "wrongdoing must be conscious to be criminal." *Id.*, at 252. As Justice Jackson explained, this principle is "as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the

normal individual to choose between good and evil." *Id.*, at 250. The "central thought" is that a defendant must be "blameworthy in mind" before he can be found guilty, a concept courts have expressed over time through various terms such as *mens rea*, scienter, malice aforethought, guilty knowledge, and the like. *Id.*, at 252; 1 W. LaFave, Substantive Criminal Law §5.1, pp. 332–333 (2d ed. 2003). Although there are exceptions, the "general rule" is that a guilty mind is "a necessary element in the indictment and proof of every crime." *United States* v. *Balint*, 258 U. S. 250, 251 (1922). We therefore generally "interpret[] criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them." *United States* v. *X-Citement Video, Inc.*, 513 U. S. 64, 70 (1994).

This is not to say that a defendant must know that his conduct is illegal before he may be found guilty. The familiar maxim "ignorance of the law is no excuse" typically holds true. Instead, our cases have explained that a defendant generally must "know the facts that make his conduct fit the definition of the offense," *Staples* v. *United States*, 511 U. S. 600, 608, n. 3 (1994), even if he does not know that those facts give rise to a crime.

*Morissette*, for example, involved an individual who had taken spent shell casings from a Government bombing range, believing them to have been abandoned. During his trial for "knowingly convert[ing]" property of the United States, the judge instructed the jury that the only question was whether the defendant had knowingly taken the property without authorization. 342 U. S., at 248–249. This Court reversed the defendant's conviction, ruling that he had to know not only that he was taking the casings, but also that someone else still had property rights in them. He could not be found liable "if he truly believed [the casings] to be abandoned." *Id.,* at 271; see *id.,* at 276.

By the same token, in *Liparota* v. *United States*, we

considered a statute making it a crime to knowingly possess or use food stamps in an unauthorized manner. 471 U. S. 419, 420 (1985). The Government's argument, similar to its position in this case, was that a defendant's conviction could be upheld if he knowingly possessed or used the food stamps, and in fact his possession or use was unauthorized. *Id.,* at 423. But this Court rejected that interpretation of the statute, because it would have criminalized "a broad range of apparently innocent conduct" and swept in individuals who had no knowledge of the facts that made their conduct blameworthy. *Id.,* at 426. For example, the statute made it illegal to use food stamps at a store that charged higher prices to food stamp customers. Without a mental state requirement in the statute, an individual who unwittingly paid higher prices would be guilty under the Government's interpretation. *Ibid.* The Court noted that Congress *could* have intended to cover such a "broad range of conduct," but declined "to adopt such a sweeping interpretation" in the absence of a clear indication that Congress intended that result. *Id.,* at 427. The Court instead construed the statute to require knowledge of the facts that made the use of the food stamps unauthorized. *Id.,* at 425.

To take another example, in *Posters 'N' Things, Ltd.* v. *United States*, this Court interpreted a federal statute prohibiting the sale of drug paraphernalia. 511 U. S. 513 (1994). Whether the items in question qualified as drug paraphernalia was an objective question that did not depend on the defendant's state of mind. *Id.,* at 517–522. But, we held, an individual could not be convicted of selling such paraphernalia unless he "knew that the items at issue [were] likely to be used with illegal drugs." *Id.,* at 524. Such a showing was necessary to establish the defendant's culpable state of mind.

And again, in *X-Citement Video*, we considered a statute criminalizing the distribution of visual depictions of mi-

nors engaged in sexually explicit conduct. 513 U. S., at 68. We rejected a reading of the statute which would have required only that a defendant knowingly send the prohibited materials, regardless of whether he knew the age of the performers. *Id.,* at 68–69. We held instead that a defendant must also know that those depicted were minors, because that was "the crucial element separating legal innocence from wrongful conduct." *Id.*, at 73. See also *Staples,* 511 U. S., at 619 (defendant must know that his weapon had automatic firing capability to be convicted of possession of such a weapon).

When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute "only that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter* v. *United States*, 530 U. S. 255, 269 (2000) (quoting *X-Citement Video,* 513 U. S., at 72). In some cases, a general requirement that a defendant *act* knowingly is itself an adequate safeguard. For example, in *Carter*, we considered whether a conviction under 18 U. S. C. §2113(a), for taking "by force and violence" items of value belonging to or in the care of a bank, requires that a defendant have the intent to steal. 530 U. S., at 261. We held that once the Government proves the defendant forcibly took the money, "the concerns underlying the presumption in favor of scienter are fully satisfied, for a forceful taking—even by a defendant who takes under a good-faith claim of right—falls outside the realm of . . . 'otherwise innocent'" conduct. *Id.*, at 269–270. In other instances, however, requiring only that the defendant act knowingly "would fail to protect the innocent actor." *Id.*, at 269. A statute similar to Section 2113(a) that did not require a forcible taking or the intent to steal "would run the risk of punishing seemingly innocent conduct in the case of a defendant who peaceably takes money believing it to be his." *Ibid.* In such a case, the Court explained, the

statute "would need to be read to require . . . that the defendant take the money with 'intent to steal or purloin.'" *Ibid.*

C

Section 875(c), as noted, requires proof that a communication was transmitted and that it contained a threat. The "presumption in favor of a scienter requirement should apply to *each* of the statutory elements that criminalize otherwise innocent conduct." *X-Citement Video,* 513 U. S., at 72 (emphasis added). The parties agree that a defendant under Section 875(c) must know that he is transmitting a communication. But communicating *something* is not what makes the conduct "wrongful." Here "the crucial element separating legal innocence from wrongful conduct" is the threatening nature of the communication. *Id.,* at 73. The mental state requirement must therefore apply to the fact that the communication contains a threat.

Elonis's conviction, however, was premised solely on how his posts would be understood by a reasonable person. Such a "reasonable person" standard is a familiar feature of civil liability in tort law, but is inconsistent with "the conventional requirement for criminal conduct—*awareness* of some wrongdoing." *Staples*, 511 U. S., at 606–607 (quoting *United States* v. *Dotterweich*, 320 U. S. 277, 281 (1943); emphasis added). Having liability turn on whether a "reasonable person" regards the communication as a threat—regardless of what the defendant thinks—"reduces culpability on the all-important element of the crime to negligence," *Jeffries*, 692 F. 3d, at 484 (Sutton, J., *dubitante*), and we "have long been reluctant to infer that a negligence standard was intended in criminal statutes," *Rogers* v. *United States*, 422 U. S. 35, 47 (1975) (Marshall, J., concurring) (citing *Morissette*, 342 U. S. 246). See 1 C. Torcia, Wharton's Criminal Law §27, pp. 171–172 (15th

ed. 1993); *Cochran* v. *United States*, 157 U. S. 286, 294 (1895) (defendant could face "liability in a civil action for negligence, but he could only be held criminally for an evil intent actually existing in his mind"). Under these principles, "what [Elonis] thinks" does matter. App. 286.

The Government is at pains to characterize its position as something other than a negligence standard, emphasizing that its approach would require proof that a defendant "comprehended [the] contents and context" of the communication. Brief for United States 29. The Government gives two examples of individuals who, in its view, would lack this necessary mental state—a "foreigner, ignorant of the English language," who would not know the meaning of the words at issue, or an individual mailing a sealed envelope without knowing its contents. *Ibid.* But the fact that the Government would require a defendant to actually know the words of and circumstances surrounding a communication does not amount to a rejection of negligence. Criminal negligence standards often incorporate "the circumstances known" to a defendant. ALI, Model Penal Code §2.02(2)(d) (1985). See *id.*, Comment 4, at 241; 1 LaFave, Substantive Criminal Law §5.4, at 372–373. Courts then ask, however, whether a reasonable person equipped with that knowledge, not the actual defendant, would have recognized the harmfulness of his conduct. That is precisely the Government's position here: Elonis can be convicted, the Government contends, if he himself knew the contents and context of his posts, and a reasonable person would have recognized that the posts would be read as genuine threats. That is a negligence standard.

In support of its position the Government relies most heavily on *Hamling* v. *United States*, 418 U. S. 87 (1974). In that case, the Court rejected the argument that individuals could be convicted of mailing obscene material only if they knew the "legal status of the materials" distributed. *Id.*, at 121. Absolving a defendant of liability

because he lacked the knowledge that the materials were legally obscene "would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law." *Id.,* at 123. It was instead enough for liability that "a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials." *Ibid*.

This holding does not help the Government. In fact, the Court in *Hamling* approved a state court's conclusion that requiring a defendant to know the character of the material incorporated a "vital element of scienter" so that "not innocent but *calculated purveyance* of filth . . . is exorcised." *Id.,* at 122 (quoting *Mishkin* v. *New York*, 383 U. S. 502, 510 (1966); internal quotation marks omitted). In this case, "calculated purveyance" of a threat would require that Elonis know the threatening nature of his communication. Put simply, the mental state requirement the Court approved in *Hamling* turns on whether a defendant knew the *character* of what was sent, not simply its contents and context.

Contrary to the dissent's suggestion, see *post*, at 4–5, 9–10 (opinion of THOMAS, J.), nothing in *Rosen* v. *United States*, 161 U. S. 29 (1896), undermines this reading. The defendant's contention in *Rosen* was that his indictment for mailing obscene material was invalid because it did not allege that he was aware of the contents of the mailing. *Id.,* at 31–33. That is not at issue here; there is no dispute that Elonis knew the words he communicated. The defendant also argued that he could not be convicted of mailing obscene material if he did not know that the material "could be properly or justly characterized as obscene." *Id.,* at 41. The Court correctly rejected this "ignorance of the law" defense; no such contention is at issue here. See *supra,* at 10.

* * *

In light of the foregoing, Elonis's conviction cannot stand. The jury was instructed that the Government need prove only that a reasonable person would regard Elonis's communications as threats, and that was error. Federal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state. That understanding "took deep and early root in American soil" and Congress left it intact here: Under Section 875(c), "wrongdoing must be conscious to be criminal." *Morissette*, 342 U. S., at 252.

There is no dispute that the mental state requirement in Section 875(c) is satisfied if the defendant transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat. See Tr. of Oral Arg. 25, 56. In response to a question at oral argument, Elonis stated that a finding of recklessness would not be sufficient. See *id.,* at 8–9. Neither Elonis nor the Government has briefed or argued that point, and we accordingly decline to address it. See *Department of Treasury, IRS* v. *FLRA*, 494 U. S. 922, 933 (1990) (this Court is "poorly situated" to address an argument the Court of Appeals did not consider, the parties did not brief, and counsel addressed in "only the most cursory fashion at oral argument"). Given our disposition, it is not necessary to consider any First Amendment issues.

Both JUSTICE ALITO and JUSTICE THOMAS complain about our not deciding whether recklessness suffices for liability under Section 875(c). *Post*, at 1–2 (ALITO, J., concurring in part and dissenting in part); *post,* at 1–2 (opinion of THOMAS, J.). JUSTICE ALITO contends that each party "argued" this issue, *post,* at 2, but they did not address it at all until oral argument, and even then only briefly. See Tr. of Oral Arg. at 8, 38–39.

JUSTICE ALITO also suggests that we have not clarified confusion in the lower courts. That is wrong. Our holding

makes clear that negligence is not sufficient to support a conviction under Section 875(c), contrary to the view of nine Courts of Appeals. Pet. for Cert. 17. There was and is no circuit conflict over the question JUSTICE ALITO and JUSTICE THOMAS would have us decide—whether recklessness suffices for liability under Section 875(c). No Court of Appeals has even addressed that question. We think that is more than sufficient "justification," *post,* at 2 (opinion of ALITO, J.), for us to decline to be the first appellate tribunal to do so.

Such prudence is nothing new. See *United States* v. *Bailey*, 444 U. S. 394, 407 (1980) (declining to decide whether mental state of recklessness or negligence could suffice for criminal liability under 18 U. S. C. §751, even though a "court may someday confront a case" presenting issue); *Ginsberg* v. *New York*, 390 U. S. 629, 644–645 (1968) (rejecting defendant's challenge to obscenity law "makes it unnecessary for us to define further today 'what sort of mental element is requisite to a constitutionally permissible prosecution'"); *Smith* v. *California*, 361 U. S. 147, 154 (1959) (overturning conviction because lower court did not require any mental element under statute, but noting that "[w]e need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution"); cf. *Gulf Oil Co.* v. *Bernard*, 452 U. S. 89, 103–104 (1981) (finding a lower court's order impermissible under the First Amendment but not deciding "what standards are mandated by the First Amendment in this kind of case").

We may be "capable of deciding the recklessness issue," *post,* at 2 (opinion of ALITO, J.), but following our usual practice of awaiting a decision below and hearing from the parties would help ensure that we decide it correctly.

The judgment of the United States Court of Appeals for the Third Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

# SUPREME COURT OF THE UNITED STATES

No. 13–983

ANTHONY DOUGLAS ELONIS, PETITIONER *v.*
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[June 1, 2015]

JUSTICE ALITO, concurring in part and dissenting in part.

In *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803), the Court famously proclaimed: "It is emphatically the province and duty of the judicial department to say what the law is." Today, the Court announces: It is emphatically the prerogative of this Court to say only what the law is not.

The Court's disposition of this case is certain to cause confusion and serious problems. Attorneys and judges need to know which mental state is required for conviction under 18 U. S. C. §875(c), an important criminal statute. This case squarely presents that issue, but the Court provides only a partial answer. The Court holds that the jury instructions in this case were defective because they required only negligence in conveying a threat. But the Court refuses to explain what type of intent was necessary. Did the jury need to find that Elonis had the *purpose* of conveying a true threat? Was it enough if he *knew* that his words conveyed such a threat? Would *recklessness* suffice? The Court declines to say. Attorneys and judges are left to guess.

This will have regrettable consequences. While this Court has the luxury of choosing its docket, lower courts and juries are not so fortunate. They must actually decide

cases, and this means applying a standard. If purpose or knowledge is needed and a district court instructs the jury that recklessness suffices, a defendant may be wrongly convicted. On the other hand, if recklessness is enough, and the jury is told that conviction requires proof of more, a guilty defendant may go free. We granted review in this case to resolve a disagreement among the Circuits. But the Court has compounded—not clarified—the confusion.

There is no justification for the Court's refusal to provide an answer. The Court says that "[n]either Elonis nor the Government has briefed or argued" the question whether recklessness is sufficient. *Ante*, at 16. But in fact both parties addressed that issue. Elonis argued that recklessness is not enough, and the Government argued that it more than suffices. If the Court thinks that we cannot decide the recklessness question without additional help from the parties, we can order further briefing and argument. In my view, however, we are capable of deciding the recklessness issue, and we should resolve that question now.

## I

Section 875(c) provides in relevant part:

> "Whoever transmits in interstate or foreign commerce any communication containing . . . any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both."

Thus, conviction under this provision requires proof that: (1) the defendant transmitted something, (2) the thing transmitted was a threat to injure the person of another, and (3) the transmission was in interstate or foreign commerce.

At issue in this case is the *mens rea* required with respect to the second element—that the thing transmitted was a threat to injure the person of another. This Court

has not defined the meaning of the term "threat" in §875(c), but in construing the same term in a related statute, the Court distinguished a "true 'threat'" from facetious or hyperbolic remarks. *Watts* v. *United States*, 394 U. S. 705, 708 (1969) (*per curiam*). In my view, the term "threat" in §875(c) can fairly be defined as a statement that is reasonably interpreted as "an expression of an intention to inflict evil, injury, or damage on another." Webster's Third New International Dictionary 2382 (1976). Conviction under §875(c) demands proof that the defendant's transmission was in fact a threat, *i.e.*, that it is reasonable to interpret the transmission as an expression of an intent to harm another. In addition, it must be shown that the defendant was at least reckless as to whether the transmission met that requirement.

Why is recklessness enough? My analysis of the *mens rea* issue follows the same track as the Court's, as far as it goes. I agree with the Court that we should presume that criminal statutes require some sort of *mens rea* for conviction. See *ante,* at 9–13. To be sure, this presumption marks a departure from the way in which we generally interpret statutes. We "ordinarily resist reading words or elements into a statute that do not appear on its face." *Bates* v. *United States,* 522 U. S. 23, 29 (1997). But this step is justified by a well-established pattern in our criminal laws. "For several centuries (at least since 1600) the different common law crimes have been so defined as to require, for guilt, that the defendant's acts or omissions be accompanied by one or more of the various types of fault (intention, knowledge, recklessness or—more rarely—negligence)." 1 W. LaFave, Substantive Criminal Law §5.5, p. 381 (2003). Based on these "background rules of the common law, in which the requirement of some *mens rea* for a crime is firmly embedded," we require "some indication of congressional intent, express or implied, . . . to dispense with *mens rea* as an element of a crime."

*Staples* v. *United States*, 511 U. S. 600, 605–606 (1994).

For a similar reason, I agree with the Court that we should presume that an offense like that created by §875(c) requires more than negligence with respect to a critical element like the one at issue here. See *ante*, at 13–14. As the Court states, "[w]hen interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that *mens rea* which is necessary to separate wrongful conduct from "otherwise innocent conduct." '" *Ante*, at 12 (quoting *Carter* v. *United States*, 530 U. S. 255, 269 (2000)). Whether negligence is morally culpable is an interesting philosophical question, but the answer is at least sufficiently debatable to justify the presumption that a serious offense against the person that lacks any clear common-law counterpart should be presumed to require more.

Once we have passed negligence, however, no further presumptions are defensible. In the hierarchy of mental states that may be required as a condition for criminal liability, the *mens rea* just above negligence is recklessness. Negligence requires only that the defendant "should [have] be[en] aware of a substantial and unjustifiable risk," ALI, Model Penal Code §2.02(2)(d), p. 226 (1985), while recklessness exists "when a person disregards a risk of harm of which he is aware," *Farmer* v. *Brennan*, 511 U. S. 825, 837 (1994); Model Penal Code §2.02(2)(c). And when Congress does not specify a *mens rea* in a criminal statute, we have no justification for inferring that anything more than recklessness is needed. It is quite unusual for us to interpret a statute to contain a requirement that is nowhere set out in the text. Once we have reached recklessness, we have gone as far as we can without stepping over the line that separates interpretation from amendment.

There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide

variety of contexts, we have described reckless conduct as morally culpable. See, *e.g., Farmer, supra*, at 835–836 (deliberate indifference to an inmate's harm); *Garrison* v. *Louisiana*, 379 U. S. 64, 75 (1964) (criminal libel); *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 279–280 (1964) (civil libel). Indeed, this Court has held that "reckless disregard for human life" may justify the death penalty. *Tison* v. *Arizona*, 481 U. S. 137, 157 (1987). Someone who acts recklessly with respect to conveying a threat necessarily grasps that he is not engaged in innocent conduct. He is not merely careless. He is aware that others could regard his statements as a threat, but he delivers them anyway.

Accordingly, I would hold that a defendant may be convicted under §875(c) if he or she consciously disregards the risk that the communication transmitted will be interpreted as a true threat. Nothing in the Court's noncommittal opinion prevents lower courts from adopting that standard.

## II

There remains the question whether interpreting §875(c) to require no more than recklessness with respect to the element at issue here would violate the First Amendment. Elonis contends that it would. I would reject that argument.

It is settled that the Constitution does not protect true threats. See *Virginia* v. *Black*, 538 U. S. 343, 359–360 (2003); *R. A. V.* v. *St. Paul*, 505 U. S. 377, 388 (1992); *Watts*, 394 U. S., at 707–708. And there are good reasons for that rule: True threats inflict great harm and have little if any social value. A threat may cause serious emotional stress for the person threatened and those who care about that person, and a threat may lead to a violent confrontation. It is true that a communication containing a threat may include other statements that have value

and are entitled to protection. But that does not justify constitutional protection for the threat itself.

Elonis argues that the First Amendment protects a threat if the person making the statement does not actually intend to cause harm. In his view, if a threat is made for a "'therapeutic'" purpose, "to 'deal with the pain' . . . of a wrenching event," or for "cathartic" reasons, the threat is protected. Brief for Petitioner 52–53. But whether or not the person making a threat intends to cause harm, the damage is the same. And the fact that making a threat may have a therapeutic or cathartic effect for the speaker is not sufficient to justify constitutional protection. Some people may experience a therapeutic or cathartic benefit only if they know that their words will cause harm or only if they actually plan to carry out the threat, but surely the First Amendment does not protect them.

Elonis also claims his threats were constitutionally protected works of art. Words like his, he contends, are shielded by the First Amendment because they are similar to words uttered by rappers and singers in public performances and recordings. To make this point, his brief includes a lengthy excerpt from the lyrics of a rap song in which a very well-compensated rapper imagines killing his ex-wife and dumping her body in a lake. If this celebrity can utter such words, Elonis pleads, amateurs like him should be able to post similar things on social media. But context matters. "Taken in context," lyrics in songs that are performed for an audience or sold in recorded form are unlikely to be interpreted as a real threat to a real person. *Watts, supra*, at 708. Statements on social media that are pointedly directed at their victims, by contrast, are much more likely to be taken seriously. To hold otherwise would grant a license to anyone who is clever enough to dress up a real threat in the guise of rap lyrics, a parody, or something similar.

The facts of this case illustrate the point. Imagine the

effect on Elonis's estranged wife when she read this: "'If I only knew then what I know now . . . I would have smothered your ass with a pillow, dumped your body in the back seat, dropped you off in Toad Creek and made it look like a rape and murder.'" 730 F. 3d 321, 324 (CA3 2013). Or this: "There's one way to love you but a thousand ways to kill you. I'm not going to rest until your body is a mess, soaked in blood and dying from all the little cuts." *Ibid.* Or this: "Fold up your [protection from abuse order] and put it in your pocket[.] Is it thick enough to stop a bullet?" *Id.,* at 325.

There was evidence that Elonis made sure his wife saw his posts. And she testified that they made her feel "'extremely afraid'" and "'like [she] was being stalked.'" *Ibid.* Considering the context, who could blame her? Threats of violence and intimidation are among the most favored weapons of domestic abusers, and the rise of social media has only made those tactics more commonplace. See Brief for The National Network to End Domestic Violence et al. as *Amici Curiae* 4–16. A fig leaf of artistic expression cannot convert such hurtful, valueless threats into protected speech.

It can be argued that §875(c), if not limited to threats made with the intent to harm, will chill statements that do not qualify as true threats, *e.g.*, statements that may be literally threatening but are plainly not meant to be taken seriously. We have sometimes cautioned that it is necessary to "exten[d] a measure of strategic protection" to otherwise unprotected false statements of fact in order to ensure enough "'breathing space'" for protected speech. *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 342 (1974) (quoting *NAACP* v. *Button*, 371 U. S. 415, 433 (1963)). A similar argument might be made with respect to threats. But we have also held that the law provides adequate breathing space when it requires proof that false statements were made with reckless disregard of their falsity.

See *New York Times,* 376 U. S., at 279–280 (civil liability); *Garrison,* 379 U. S., at 74–75 (criminal liability). Requiring proof of recklessness is similarly sufficient here.

## III

Finally, because the jury instructions in this case did not require proof of recklessness, I would vacate the judgment below and remand for the Court of Appeals to decide in the first instance whether Elonis's conviction could be upheld under a recklessness standard.

We do not lightly overturn criminal convictions, even where it appears that the district court might have erred. To benefit from a favorable ruling on appeal, a defendant must have actually asked for the legal rule the appellate court adopts. Rule 30(d) of the Federal Rules of Criminal Procedure requires a defendant to "inform the court of the specific objection and the grounds for the objection." An objection cannot be vague or open-ended. It must *specifically* identify the alleged error. And failure to lodge a sufficient objection "precludes appellate review," except for plain error. Rule 30(d); see also 2A C. Wright & P. Henning, Federal Practice and Procedure §484, pp. 433–435 (4th ed. 2009).

At trial, Elonis objected to the District Court's instruction, but he did not argue for recklessness. Instead, he proposed instructions that would have required proof that he acted purposefully or with knowledge that his statements would be received as threats. See App. 19–21. He advanced the same position on appeal and in this Court. See Brief for Petitioner 29 ("Section 875(c) requires proof that the defendant *intended* the charged statement to be a 'threat'" (emphasis in original)); Corrected Brief of Appellant in No. 12–3798 (CA3), p. 14 ("[A] 'true threat' has been uttered only if the speaker acted with *subjective intent to threaten*" (same)). And at oral argument before this Court, he expressly disclaimed any agreement with a

recklessness standard—which the Third Circuit remains free to adopt. Tr. of Oral Arg. 8:22–23 ("[W]e would say that recklessness is not justif[ied]"). I would therefore remand for the Third Circuit to determine if Elonis's failure (indeed, *refusal*) to argue for recklessness prevents reversal of his conviction.

The Third Circuit should also have the opportunity to consider whether the conviction can be upheld on harmless-error grounds. "We have often applied harmless-error analysis to cases involving improper instructions." *Neder* v. *United States*, 527 U. S. 1, 9 (1999); see also, *e.g., Pope* v. *Illinois*, 481 U. S. 497, 503–504 (1987) (remanding for harmless-error analysis after holding that jury instruction misstated obscenity standard). And the Third Circuit has previously upheld convictions where erroneous jury instructions proved harmless. See, *e.g., United States* v. *Saybolt*, 577 F. 3d 195, 206–207 (2009). It should be given the chance to address that possibility here.

# SUPREME COURT OF THE UNITED STATES

No. 13–983

ANTHONY DOUGLAS ELONIS, PETITIONER *v.*
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[June 1, 2015]

JUSTICE THOMAS, dissenting.

We granted certiorari to resolve a conflict in the lower courts over the appropriate mental state for threat prosecutions under 18 U. S. C. §875(c). Save two, every Circuit to have considered the issue—11 in total—has held that this provision demands proof only of general intent, which here requires no more than that a defendant knew he transmitted a communication, knew the words used in that communication, and understood the ordinary meaning of those words in the relevant context. The outliers are the Ninth and Tenth Circuits, which have concluded that proof of an intent to threaten was necessary for conviction. Adopting the minority position, Elonis urges us to hold that §875(c) and the First Amendment require proof of an intent to threaten. The Government in turn advocates a general-intent approach.

Rather than resolve the conflict, the Court casts aside the approach used in nine Circuits and leaves nothing in its place. Lower courts are thus left to guess at the appropriate mental state for §875(c). All they know after today's decision is that a requirement of general intent will not do. But they can safely infer that a majority of this Court would not adopt an intent-to-threaten requirement, as the opinion carefully leaves open the possibility that recklessness may be enough. See *ante,* at 16–17.

This failure to decide throws everyone from appellate judges to everyday Facebook users into a state of uncertainty. This uncertainty could have been avoided had we simply adhered to the background rule of the common law favoring general intent. Although I am sympathetic to my colleagues' policy concerns about the risks associated with threat prosecutions, the answer to such fears is not to discard our traditional approach to state-of-mind requirements in criminal law. Because the Court of Appeals properly applied the general-intent standard, and because the communications transmitted by Elonis were "true threats" unprotected by the First Amendment, I would affirm the judgment below.

## I

### A

Enacted in 1939, §875(c) provides, "Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both." Because §875(c) criminalizes speech, the First Amendment requires that the term "threat" be limited to a narrow class of historically unprotected communications called "true threats." To qualify as a true threat, a communication must be a serious expression of an intention to commit unlawful physical violence, not merely "political hyperbole"; "vehement, caustic, and sometimes unpleasantly sharp attacks"; or "vituperative, abusive, and inexact" statements. *Watts* v. *United States*, 394 U. S. 705, 708 (1969) (*per curiam*) (internal quotation marks omitted). It also cannot be determined solely by the reaction of the recipient, but must instead be "determined by the interpretation of a *reasonable* recipient familiar with the context of the communication," *United States* v. *Darby*, 37 F. 3d 1059, 1066 (CA4 1994) (emphasis added), lest histor-

ically protected speech be suppressed at the will of an eggshell observer, cf. *Cox* v. *Louisiana*, 379 U. S. 536, 551 (1965) ("[C]onstitutional rights may not be denied simply because of hostility to their assertion or exercise" (internal quotation marks omitted)). There is thus no dispute that, at a minimum, §875(c) requires an objective showing: The communication must be one that "a reasonable observer would construe as a true threat to another." *United States* v. *Jeffries*, 692 F. 3d 473, 478 (CA6 2012). And there is no dispute that the posts at issue here meet that objective standard.

The only dispute in this case is about the state of mind necessary to convict Elonis for making those posts. On its face, §875(c) does not demand any particular mental state. As the Court correctly explains, the word "threat" does not itself contain a *mens rea* requirement. See *ante,* at 8–9. But because we read criminal statutes "in light of the background rules of the common law, in which the requirement of some *mens rea* for a crime is firmly embedded," we require "some indication of congressional intent, express or implied, . . . to dispense with *mens rea* as an element of a crime." *Staples* v. *United States*, 511 U. S. 600, 605–606 (1994) (citation omitted). Absent such indicia, we ordinarily apply the "presumption in favor of scienter" to require only "proof of *general intent*—that is, that the defendant [must] posses[s] knowledge with respect to the *actus reus* of the crime." *Carter* v. *United States*, 530 U. S. 255, 268 (2000).

Under this "conventional *mens rea* element," "the defendant [must] know the facts that make his conduct illegal," *Staples, supra*, at 605, but he need not know *that* those facts make his conduct illegal. It has long been settled that "the knowledge requisite to knowing violation of a statute is factual knowledge as distinguished from knowledge of the law." *Bryan* v. *United States*, 524 U. S. 184, 192 (1998) (internal quotation marks omitted). For

instance, in *Posters 'N' Things, Ltd.* v. *United States*, 511 U. S. 513 (1994), the Court addressed a conviction for selling drug paraphernalia under a statute forbidding anyone to "'make use of the services of the Postal Service or other interstate conveyance as part of a scheme to sell drug paraphernalia,'" *id.,* at 516 (quoting 21 U. S. C. §857(a)(1) (1988 ed.)). In applying the presumption in favor of scienter, the Court concluded that "although the Government must establish that the defendant knew that the items at issue are likely to be used with illegal drugs, it need not prove specific knowledge that the items are 'drug paraphernalia' within the meaning of the statute." 511 U. S., at 524.

Our default rule in favor of general intent applies with full force to criminal statutes addressing speech. Well over 100 years ago, this Court considered a conviction under a federal obscenity statute that punished anyone "'who shall knowingly deposit, or cause to be deposited, for mailing or delivery,'" any "'obscene, lewd, or lascivious book, pamphlet, picture, paper, writing, print, or other publication of an indecent character.'" *Rosen* v. *United States*, 161 U. S. 29, 30 (1896) (quoting Rev. Stat. §3893). In that case, as here, the defendant argued that, even if "he may have had . . . actual knowledge or notice of [the paper's] contents" when he put it in the mail, he could not "be convicted of the offence . . . unless he knew or believed that such paper could be properly or justly characterized as obscene, lewd, and lascivious." 161 U. S., at 41. The Court rejected that theory, concluding that if the material was actually obscene and "deposited in the mail by one who knew or had notice at the time of its contents, the offence is complete, although the defendant himself did not regard the paper as one that the statute forbade to be carried in the mails." *Ibid.* As the Court explained, "Congress did not intend that the question as to the character of the paper should depend upon the opinion or belief of

the person who, with knowledge or notice of [the paper's] contents, assumed the responsibility of putting it in the mails of the United States," because "[e]very one who uses the mails of the United States for carrying papers or publications must take notice of . . . what must be deemed obscene, lewd, and lascivious." *Id.,* at 41–42.

This Court reaffirmed *Rosen*'s holding in *Hamling* v. *United States*, 418 U. S. 87 (1974), when it considered a challenge to convictions under the successor federal statute, see *id.,* at 98, n. 8 (citing 18 U. S. C. §1461 (1970 ed.)). Relying on *Rosen,* the Court rejected the argument that the statute required "proof both of knowledge of the contents of the material and awareness of the obscene character of the material." 418 U. S., at 120 (internal quotation marks omitted). In approving the jury instruction that the defendants' "belief as to the obscenity or non-obscenity of the material is irrelevant," the Court declined to hold "that the prosecution must prove a defendant's knowledge of the legal status of the materials he distributes." *Id.*, at 120–121 (internal quotation marks omitted). To rule otherwise, the Court observed, "would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law." *Id.,* at 123.

Decades before §875(c)'s enactment, courts took the same approach to the first federal threat statute, which prohibited threats against the President. In 1917, Congress enacted a law punishing anyone

> "who knowingly and willfully deposits or causes to be deposited for conveyance in the mail . . . any letter, paper, writing, print, missive, or document containing any threat to take the life of or to inflict bodily harm upon the President of the United States, or who knowingly and willfully otherwise makes any such threat against the President." Act of Feb. 14, 1917, ch. 64, 39 Stat. 919.

Courts applying this statute shortly after its enactment appeared to require proof of only general intent. In *Ragansky* v. *United States*, 253 F. 643 (CA7 1918), for instance, a Court of Appeals held that "[a] threat is knowingly made, if the maker of it comprehends the meaning of the words uttered by him," and "is willfully made, if in addition to comprehending the meaning of his words, the maker voluntarily and intentionally utters them as the declaration of an apparent determination to carry them into execution," *id.*, at 645. The court consequently rejected the defendant's argument that he could not be convicted when his language "[c]oncededly . . . constituted such a threat" but was meant only "as a joke." *Id.,* at 644. Likewise, in *United States* v. *Stobo*, 251 F. 689 (Del. 1918), a District Court rejected the defendant's objection that there was no allegation "of any facts . . . indicating any intention . . . on the part of the defendant . . . to menace the President of the United States," *id.,* at 693 (internal quotation marks omitted). As it explained, the defendant "is punishable under the act whether he uses the words lightly or with a set purpose to kill," as "[t]he effect upon the minds of the hearers, who cannot read his inward thoughts, is precisely the same." *Ibid.* At a minimum, there is no historical practice requiring more than general intent when a statute regulates speech.

B

Applying ordinary rules of statutory construction, I would read §875(c) to require proof of general intent. To "know the facts that make his conduct illegal" under §875(c), see *Staples,* 511 U. S.*,* at 605, a defendant must know that he transmitted a communication in interstate or foreign commerce that contained a threat. Knowing that the communication contains a "threat"—a serious expression of an intention to engage in unlawful physical violence—does not, however, require knowing that a jury

will conclude that the communication contains a threat as a matter of law. Instead, like one who mails an "obscene" publication and is prosecuted under the federal obscenity statute, a defendant prosecuted under §875(c) must know only the words used in that communication, along with their ordinary meaning in context.

General intent divides those who know the facts constituting the *actus reus* of this crime from those who do not. For example, someone who transmits a threat who does not know English—or who knows English, but perhaps does not know a threatening idiom—lacks the general intent required under §875(c). See *Ragansky*, *supra,* at 645 ("[A] foreigner, ignorant of the English language, repeating [threatening] words without knowledge of their meaning, may not knowingly have made a threat"). Likewise, the hapless mailman who delivers a threatening letter, ignorant of its contents, should not fear prosecution. A defendant like Elonis, however, who admits that he "knew that what [he] was saying was violent" but supposedly "just wanted to express [him]self," App. 205, acted with the general intent required under §875(c), even if he did not know that a jury would conclude that his communication constituted a "threat" as a matter of law.

Demanding evidence only of general intent also corresponds to §875(c)'s statutory backdrop. As previously discussed, before the enactment of §875(c), courts had read the Presidential threats statute to require proof only of general intent. Given Congress' presumptive awareness of this application of the Presidential threats statute—not to mention this Court's similar approach in the obscenity context, see *Rosen*, 161 U. S., at 41–42—it is difficult to conclude that the Congress that enacted §875(c) in 1939 understood it to contain an implicit mental-state requirement apart from general intent. There is certainly no textual evidence to support this conclusion. If anything, the text supports the opposite inference, as §875(c), unlike

the Presidential threats statute, contains no reference to knowledge or willfulness. Nothing in the statute suggests that Congress departed from the "conventional *mens rea* element" of general intent, *Staples*, *supra,* at 605; I would not impose a higher mental-state requirement here.

C

The majority refuses to apply these ordinary background principles. Instead, it casts my application of general intent as a negligence standard disfavored in the criminal law. *Ante,* at 13–16. But that characterization misses the mark. Requiring general intent in this context is not the same as requiring mere negligence. Like the mental-state requirements adopted in many of the cases cited by the Court, general intent under §875(c) prevents a defendant from being convicted on the basis of any *fact* beyond his awareness. See, *e.g., United States* v. *X-Citement Video, Inc.*, 513 U. S. 64, 73 (1994) (knowledge of age of persons depicted in explicit materials); *Staples*, *supra,* at 614–615 (knowledge of firing capability of weapon); *Morissette* v. *United States*, 342 U. S. 246, 270–271 (1952) (knowledge that property belonged to another). In other words, the defendant must *know*—not merely be reckless or negligent with respect to the fact—that he is committing the acts that constitute the *actus reus* of the offense.

But general intent requires *no* mental state (not even a negligent one) concerning the "fact" that certain words meet the *legal* definition of a threat. That approach is particularly appropriate where, as here, that legal status is determined by a jury's application of the legal standard of a "threat" to the contents of a communication. And convicting a defendant despite his ignorance of the legal—or objective—status of his conduct does not mean that he is being punished for negligent conduct. By way of example, a defendant who is convicted of murder despite claim-

ing that he acted in self-defense has not been penalized under a negligence standard merely because he does not know that the jury will reject his argument that his "belief in the necessity of using force to prevent harm to himself [was] a reasonable one." See 2 W. LaFave, Substantive Criminal Law §10.4(c), p. 147 (2d ed. 2003).

The Court apparently does not believe that our traditional approach to the federal obscenity statute involved a negligence standard. It asserts that *Hamling* "approved a state court's conclusion that requiring a defendant to know the character of the material incorporated a 'vital element of scienter' so that 'not innocent but *calculated purveyance* of filth . . . is exorcised.'" *Ante,* at 15 (quoting *Hamling*, 418 U. S., at 122 (in turn quoting *Mishkin* v. *New York*, 383 U. S. 502, 510 (1966)). According to the Court, the mental state approved in *Hamling* thus "turns on whether a defendant knew the *character* of what was sent, not simply its contents and context." *Ante,* at 15. It is unclear what the Court means by its distinction between "character" and "contents and context." "Character" cannot mean *legal* obscenity, as *Hamling* rejected the argument that a defendant must have "awareness of the obscene character of the material." 418 U. S., at 120 (internal quotation marks omitted). Moreover, this discussion was not part of *Hamling*'s holding, which was primarily a reaffirmation of *Rosen*. See 418 U. S., at 120–121; see also *Posters 'N' Things*, 511 U. S., at 524–525 (characterizing *Hamling* as holding that a "statute prohibiting mailing of obscene materials does not require proof that [the] defendant knew the materials at issue met the legal definition of 'obscenity'").

The majority's treatment of *Rosen* is even less persuasive. To shore up its position, it asserts that the critical portion of *Rosen* rejected an "'ignorance of the law' defense," and claims that "no such contention is at issue here." *Ante,* at 15. But the thrust of Elonis' challenge is

that a §875(c) conviction cannot stand if the defendant's subjective belief of what constitutes a "threat" differs from that of a reasonable jury. That is akin to the argument the defendant made—and lost—in *Rosen*. That defendant insisted that he could not be convicted for mailing the paper "unless he knew or believed that such paper could be properly or justly characterized as obscene." 161 U. S., at 41. The Court, however, held that the Government did not need to show that the defendant "regard[ed] the paper as one that the statute forbade to be carried in the mails," because the obscene character of the material did not "depend upon the opinion or belief of the person who . . . assumed the responsibility of putting it in the mails." *Ibid.* The majority's muddying of the waters cannot obscure the fact that today's decision is irreconcilable with *Rosen* and *Hamling*.

D

The majority today at least refrains from requiring an intent to threaten for §875(c) convictions, as Elonis asks us to do. Elonis contends that proof of a defendant's intent to put the recipient of a threat in fear is necessary for conviction, but that element cannot be found within the statutory text. "[W]e ordinarily resist reading words or elements into a statute that do not appear on its face," including elements similar to the one Elonis proposes. *E.g., Bates* v. *United States*, 522 U. S. 23, 29 (1997) (declining to read an "intent to defraud" element into a criminal statute). As the majority correctly explains, nothing in the text of §875(c) itself requires proof of an intent to threaten. See *ante,* at 8–9. The absence of such a requirement is significant, as Congress knows how to require a heightened *mens rea* in the context of threat offenses. See §875(b) (providing for the punishment of "[w]hoever, with intent to extort . . . , transmits in interstate or foreign commerce any communication containing

any threat to kidnap any person or any threat to injure the person of another"); see also §119 (providing for the punishment of "[w]hoever knowingly makes restricted personal information about [certain officials] . . . publicly available . . . with the intent to threaten").

Elonis nonetheless suggests that an intent-to-threaten element is necessary in order to avoid the risk of punishing innocent conduct. But there is nothing absurd about punishing an individual who, with knowledge of the words he uses and their ordinary meaning in context, makes a threat. For instance, a high-school student who sends a letter to his principal stating that he will massacre his classmates with a machine gun, even if he intended the letter as a joke, cannot fairly be described as engaging in innocent conduct. But see *ante,* at 4–5, 16 (concluding that Elonis' conviction under §875(c) for discussing a plan to "'initiate the most heinous school shooting ever imagined'" against "'a Kindergarten class'" cannot stand without proof of some unspecified heightened mental state).

Elonis also insists that we read an intent-to-threaten element into §875(c) in light of the First Amendment. But our practice of construing statutes "to avoid constitutional questions . . . is not a license for the judiciary to rewrite language enacted by the legislature," *Salinas* v. *United States*, 522 U. S. 52, 59–60 (1997) (internal quotation marks omitted), and ordinary background principles of criminal law do not support rewriting §875(c) to include an intent-to-threaten requirement. We have not altered our traditional approach to *mens rea* for other constitutional provisions. See, *e.g., Dean* v. *United States*, 556 U. S. 568, 572–574 (2009) (refusing to read an intent-to-discharge-the-firearm element into a mandatory minimum provision concerning the discharge of a firearm during a particular crime). The First Amendment should be treated no differently.

## II

In light of my conclusion that Elonis was properly convicted under the requirements of §875(c), I must address his argument that his threatening posts were nevertheless protected by the First Amendment.

### A

Elonis does not contend that threats are constitutionally protected speech, nor could he: "From 1791 to the present, . . . our society . . . has permitted restrictions upon the content of speech in a few limited areas," true threats being one of them. *R. A. V.* v. *St. Paul*, 505 U. S. 377, 382–383 (1992); see *id.,* at 388. Instead, Elonis claims that only *intentional* threats fall within this particular historical exception.

If it were clear that intentional threats alone have been punished in our Nation since 1791, I would be inclined to agree. But that is the not the case. Although the Federal Government apparently did not get into the business of regulating threats until 1917, the States have been doing so since the late 18th and early 19th centuries. See, *e.g.,* 1795 N. J. Laws p. 108; Ill. Rev. Code of Laws, Crim. Code §108 (1827) (1827 Ill. Crim. Code); 1832 Fla. Laws pp. 68–69. And that practice continued even after the States amended their constitutions to include speech protections similar to those in the First Amendment. See, *e.g.,* Fla. Const., Art. I, §5 (1838); Ill. Const., Art. VIII, §22 (1818), Mich. Const., Art. I, §7 (1835); N. J. Const., Art. I, §5 (1844); J. Hood, Index of Colonial and State Laws of New Jersey 1203, 1235, 1257, 1265 (1905); 1 Ill. Stat., ch. 30, div. 9, §31 (3d ed. 1873). State practice thus provides at least some evidence of the original meaning of the phrase "freedom of speech" in the First Amendment. See *Roth* v. *United States*, 354 U. S. 476, 481–483 (1957) (engaging in a similar inquiry with respect to obscenity).

Shortly after the founding, several States and Territo-

ries enacted laws making it a crime to "knowingly send or deliver any letter or writing, with or without a name subscribed thereto, or signed with a fictitious name, . . . threatening to maim, wound, kill or murder any person, or to burn his or her [property], though no money, goods or chattels, or other valuable thing shall be demanded," *e.g.,* 1795 N. J. Laws §57, at 108; see also, *e.g.,* 1816 Ga. Laws p. 178; 1816 Mich. Territory Laws p. 128; 1827 Ill. Crim. Code §108; 1832 Fla. Laws, at 68–69. These laws appear to be the closest early analogue to §875(c), as they penalize transmitting a communication containing a threat without proof of a demand to extort something from the victim. Threat provisions explicitly requiring proof of a specific "intent to extort" appeared alongside these laws, see, *e.g.,* 1795 N. J. Laws §57, at 108, but those provisions are simply the predecessors to §875(b) and §875(d), which likewise expressly contain an intent-to-extort requirement.

The laws without that extortion requirement were copies of a 1754 English threat statute subject to only a general-intent requirement. The statute made it a capital offense to "knowingly send any Letter without any Name subscribed thereto, or signed with a fictitious Name . . . threatening to kill or murder any of his Majesty's Subject or Subjects, or to burn their [property], though no Money or Venison or other valuable Thing shall be demanded." 27 Geo. II, ch. 15, in 7 Eng. Stat. at Large 61 (1754); see also 4 W. Blackstone, Commentaries on the Laws of England 144 (1768) (describing this statute). Early English decisions applying this threat statute indicated that the appropriate mental state was general intent. In *King* v. *Girdwood*, 1 Leach 142, 168 Eng. Rep. 173 (K. B. 1776), for example, the trial court instructed the jurors that, "if they were of opinion that" the "terms of the letter conveyed an actual threat to kill or murder," "and that the prisoner knew the contents of it, they ought to find him

guilty; but that if they thought he did not know the contents, or that the words might import any thing less than to kill or murder, they ought to acquit," *id.,* at 143, 168 Eng. Rep., at 173. On appeal following conviction, the judges "thought that the case had been properly left to the Jury." *Ibid.*, 168 Eng. Rep., at 174. Other cases likewise appeared to consider only the import of the letter's language, not the intent of its sender. See, *e.g., Rex* v. *Boucher*, 4 Car. & P. 562, 563, 172 Eng. Rep. 826, 827 (K. B. 1831) (concluding that an indictment was sufficient because "th[e] letter very plainly conveys a threat to kill and murder" and "[n]o one who received it could have any doubt as to what the writer meant to threaten"); see also 2 E. East, A Treatise of the Pleas of the Crown 1116 (1806) (discussing *Jepson and Springett's Case*, in which the judges disagreed over whether "the letter must be understood as . . . importing a threat" and whether that was "a necessary construction").

Unsurprisingly, these early English cases were well known in the legal world of the 19th century United States. For instance, Nathan Dane's A General Abridgement of American Law—"a necessary adjunct to the library of every American lawyer of distinction," 1 C. Warren, History of the Harvard Law School and of Early Legal Conditions in America 414 (1908)—discussed the English threat statute and summarized decisions such as *Girdwood*. 7 N. Dane, A General Abridgement of American Law 31–32 (1824). And as this Court long ago recognized, "It is doubtless true . . . that where English statutes . . . have been adopted into our own legislation; the known and settled construction of those statutes by courts of law, has been considered as silently incorporated into the acts, or has been received with all the weight of authority." *Pennock* v. *Dialogue*, 2 Pet. 1, 18 (1829); see also, *e.g., Commonwealth* v. *Burdick*, 2 Pa. 163, 164 (1846) (considering English cases persuasive authority in interpreting similar

state statute creating the offense of obtaining property through false pretenses). In short, there is good reason to believe that States bound by their own Constitutions to protect freedom of speech long ago enacted general-intent threat statutes.

Elonis disputes this historical analysis on two grounds, but neither is persuasive. He first points to a treatise stating that the 1754 English statute was "levelled against such whose intention it was, (by writing such letters, either without names or in fictitious names,) to conceal themselves from the knowledge of the party threatened, that they might obtain their object by creating terror in [the victim's] mind." 2 W. Russell & D. Davis, A Treatise on Crimes & Misdemeanors 1845 (1st Am. ed. 1824). But the fact that the ordinary prosecution under this provision involved a defendant who intended to cause fear does not mean that such a mental state was *required* as a matter of law. After all, §875(c) is frequently deployed against people who wanted to cause their victims fear, but that fact does not answer the legal question presented in this case. See, *e.g., United States* v. *Sutcliffe*, 505 F. 3d 944, 952 (CA9 2007); see also Tr. of Oral Arg. 53 (counsel for the Government noting that "I think Congress would well have understood that the majority of these cases probably [involved] people who intended to threaten").

Elonis also cobbles together an assortment of older American authorities to prove his point, but they fail to stand up to close scrutiny. Two of his cases address the offense of breaching the peace, *Ware* v. *Loveridge*, 75 Mich. 488, 490–493, 42 N. W. 997, 998 (1889); *State* v. *Benedict*, 11 Vt. 236, 239 (1839), which is insufficiently similar to the offense criminalized in §875(c) to be of much use. Another involves a prosecution under a blackmailing statute similar to §875(b) and §875(c) in that it expressly required an "intent to extort." *Norris* v. *State*, 95 Ind. 73, 74 (1884). And his treatises do not clearly distinguish

between the offense of making threats with the intent to extort and the offense of sending threatening letters without such a requirement in their discussions of threat statutes, making it difficult to draw strong inferences about the latter category. See 2 J. Bishop, Commentaries on the Criminal Law §1201, p. 664, and nn. 5–6 (1877); 2 J. Bishop, Commentaries on the Law of Criminal Procedure §975, p. 546 (1866); 25 The American and English Encyclopædia of Law 1073 (C. Williams ed. 1894).

Two of Elonis' cases appear to discuss an offense of sending a threatening letter without an intent to extort, but even these fail to make his point. One notes in passing that character evidence is admissible "to prove *guilty knowledge* of the defendant, when that is an essential element of the crime; that is, the *quo animo*, the *intent* or design," and offers as an example that in the context of "sending a threatening letter, . . . prior and subsequent letters to the same person are competent in order to show the intent and meaning of the particular letter in question." *State* v. *Graham*, 121 N. C. 623, 627, 28 S. E. 409, 409 (1897). But it is unclear from that statement whether that court thought an *intent to threaten* was required, especially as the case it cited for this proposition—*Rex* v. *Boucher*, 4 Car. & P. 562, 563, 172 Eng. Rep. 826, 827 (K. B. 1831)—supports a general-intent approach. The other case Elonis cites involves a statutory provision that had been judicially limited to "'pertain to one or the other acts which are denounced by the statute,'" namely, terroristic activities carried out by the Ku Klux Klan. *Commonwealth* v. *Morton*, 140 Ky. 628, 630, 131 S. W. 506, 507 (1910) (quoting *Commonwealth* v. *Patrick*, 127 Ky. 473, 478, 105 S. W. 981, 982 (1907)). That case thus provides scant historical support for Elonis' position.

B

Elonis also insists that our precedents require a mental

state of intent when it comes to threat prosecutions under §875(c), primarily relying on *Watts*, 394 U. S. 705, and *Virginia* v. *Black*, 538 U. S. 343 (2003). Neither of those decisions, however, addresses whether the First Amendment requires a particular mental state for threat prosecutions.

As Elonis admits, *Watts* expressly declined to address the mental state required under the First Amendment for a "true threat." See 394 U. S., at 707–708. True, the Court in *Watts* noted "grave doubts" about *Raganksy*'s construction of "willfully" in the presidential threats statute. 394 U. S., at 707–708. But "grave doubts" do not make a holding, and that stray statement in *Watts* is entitled to no precedential force. If anything, *Watts* continued the long tradition of focusing on objective criteria in evaluating the mental requirement. See *ibid.*

The Court's fractured opinion in *Black* likewise says little about whether an intent-to-threaten requirement is constitutionally mandated here. *Black* concerned a Virginia cross-burning law that expressly required "'an intent to intimidate a person or group of persons,'" 538 U. S., at 347 (quoting Va. Code Ann. §18.2–423 (1996)), and the Court thus had no occasion to decide whether such an element was necessary in threat provisions silent on the matter. Moreover, the focus of the *Black* decision was on the statutory presumption that "any cross burning [w]as prima facie evidence of intent to intimidate." 538 U. S., at 347–348. A majority of the Court concluded that this presumption failed to distinguish unprotected threats from protected speech because it might allow convictions "based solely on the fact of cross burning itself," including cross burnings in a play or at a political rally. *Id.,* at 365–366 (plurality opinion); *id.,* at 386 (Souter, J., concurring in judgment in part and dissenting in part) ("The provision will thus tend to draw nonthreatening ideological expression within the ambit of the prohibition of intimidating

expression"). The objective standard for threats under §875(c), however, helps to avoid this problem by "forc[ing] jurors to examine the circumstances in which a statement is made." *Jeffries*, 692 F. 3d, at 480.

In addition to requiring a departure from our precedents, adopting Elonis' view would make threats one of the most protected categories of unprotected speech, thereby sowing tension throughout our First Amendment doctrine. We generally have not required a heightened mental state under the First Amendment for historically unprotected categories of speech. For instance, the Court has indicated that a legislature may constitutionally prohibit "'fighting words,' those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction," *Cohen* v. *California*, 403 U. S. 15, 20 (1971)—without proof of an intent to provoke a violent reaction. Because the definition of "fighting words" turns on how the "ordinary citizen" would react to the language, *ibid.*, this Court has observed that a defendant may be guilty of a breach of the peace if he "makes statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended," and that the punishment of such statements "as a criminal act would raise no question under [the Constitution]," *Cantwell* v. *Connecticut*, 310 U. S. 296, 309–310 (1940); see also *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572–573 (1942) (rejecting a First Amendment challenge to a general-intent construction of a state statute punishing "'fighting' words"); *State* v. *Chaplinsky*, 91 N. H. 310, 318, 18 A. 2d 754, 758 (1941) ("[T]he only intent required for conviction . . . was an intent to speak the words"). The Court has similarly held that a defendant may be convicted of mailing obscenity under the First Amendment without proof that he knew the materials were legally obscene. *Hamling,* 418 U. S.*,* at 120–124. And our precedents allow

liability in tort for false statements about private persons on matters of private concern even if the speaker acted negligently with respect to the falsity of those statements. See *Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U. S. 767, 770, 773–775 (1986). I see no reason why we should give threats pride of place among unprotected speech.

* * *

There is always a risk that a criminal threat statute may be deployed by the Government to suppress legitimate speech. But the proper response to that risk is to adhere to our traditional rule that only a narrow class of true threats, historically unprotected, may be constitutionally proscribed.

The solution is not to abandon a mental-state requirement compelled by text, history, and precedent. Not only does such a decision warp our traditional approach to *mens rea*, it results in an arbitrary distinction between threats and other forms of unprotected speech. Had Elonis mailed obscene materials to his wife and a kindergarten class, he could have been prosecuted irrespective of whether he intended to offend those recipients or recklessly disregarded that possibility. Yet when he threatened to kill his wife and a kindergarten class, his intent to terrify those recipients (or reckless disregard of that risk) suddenly becomes highly relevant. That need not—and should not—be the case.

Nor should it be the case that we cast aside the mental-state requirement compelled by our precedents yet offer nothing in its place. Our job is to decide questions, not create them. Given the majority's ostensible concern for protecting innocent actors, one would have expected it to announce a clear rule—any clear rule. Its failure to do so reveals the fractured foundation upon which today's decision rests.

I respectfully dissent.

# Gertz v. Robert Welch, Inc.

418 U.S. 323
Supreme Court of United States
June 25, 1974

GERTZ v. ROBERT WELCH, Inc. No. 72-617. Argued November 14, 1973. Decided June 25, 1974. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT. *Wayne B. Giampietro* argued the cause and filed briefs for petitioner. *Clyde J. Watts* argued the cause and filed a brief for respondent.

**MR. JUSTICE POWELL delivered the opinion of the Court.**

This Court has struggled for nearly a decade to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment. With this decision we return to that effort. We granted certiorari to reconsider the extent of a publisher's constitutional privilege against liability for defamation of a private citizen. 410 U.S. 925 (1973).

## I

In 1968 a Chicago policeman named Nuccio shot and killed a youth named Nelson. The state authorities prosecuted Nuccio for the homicide and ultimately obtained a conviction for murder in the second degree. The Nelson family retained petitioner Elmer Gertz, a reputable attorney, to represent them in civil litigation against Nuccio.

Respondent publishes American Opinion, a monthly outlet for the views of the John Birch Society. Early in the 1960's the magazine began to warn of a nationwide conspiracy to discredit local law enforcement agencies and create in their stead a national police force capable of supporting a Communist dictatorship. As part of the continuing effort to alert the public to this assumed danger, the managing editor of American Opinion commissioned an article on the murder trial of Officer Nuccio. For this purpose he engaged a regular contributor to the magazine. In March 1969 respondent published the resulting article under the title "FRAME-UP: Richard Nuccio And The War On Police." The article purports to demonstrate that the testimony against Nuccio at his criminal trial was false and that his prosecution was part of the Communist campaign against the police.

In his capacity as counsel for the Nelson family in the civil litigation, petitioner attended the coroner's inquest into the boy's death and initiated actions for damages, but he neither discussed Officer Nuccio with the press nor played any part in the criminal proceeding. Notwithstanding petitioner's remote connection with the prosecution of Nuccio, respondent's magazine portrayed him as an architect of the "frame-up." According to the article, the police file on petitioner took "a big, Irish cop to lift." The article stated that petitioner had been an official of the "Marxist League for Industrial Democracy, originally known as

the Intercollegiate Socialist Society, which has advocated the violent seizure of our government." It labeled Gertz a "Leninist" and a "Communist-fronter." It also stated that Gertz had been an officer of the National Lawyers Guild, described as a Communist organization that "probably did more than any other outfit to plan the Communist attack on the Chicago police during the 1968 Democratic Convention."

These statements contained serious inaccuracies. The implication that petitioner had a criminal record was false. Petitioner had been a member and officer of the National Lawyers Guild some 15 years earlier, but there was no evidence that he or that organization had taken any part in planning the 1968 demonstrations in Chicago. There was also no basis for the charge that petitioner was a "Leninist" or a "Communist-fronter." And he had never been a member of the "Marxist League for Industrial Democracy" or the "Intercollegiate Socialist Society."

The managing editor of American Opinion made no effort to verify or substantiate the charges against petitioner. Instead, he appended an editorial introduction stating that the author had "conducted extensive research into the Richard Nuccio Case." And he included in the article a photograph of petitioner and wrote the caption that appeared under it: "Elmer Gertz of Red Guild harrasses Nuccio." Respondent placed the issue of American Opinion containing the article on sale at newsstands throughout the country and distributed reprints of the article on the streets of Chicago.

Petitioner filed a diversity action for libel in the United States District Court for the Northern District of Illinois. He claimed that the falsehoods published by respondent injured his reputation as a lawyer and a citizen. Before filing an answer, respondent moved to dismiss the complaint for failure to state a claim upon which relief could be granted, apparently on the ground that petitioner failed to allege special damages. But the court ruled that statements contained in the article constituted libel *per se* under Illinois law and that consequently petitioner need not plead special damages. 306 F.Supp. 310 (1969).

After answering the complaint, respondent filed a pretrial motion for summary judgment, claiming a constitutional privilege against liability for defamation. It asserted that petitioner was a public official or a public figure and that the article concerned an issue of public interest and concern. For these reasons, respondent argued, it was entitled to invoke the privilege enunciated in *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964). Under this rule respondent would escape liability unless petitioner could prove publication of defamatory falsehood "with `actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.,* at 280. Respondent claimed that petitioner could not make such a showing and submitted a supporting affidavit by the magazine's managing editor. The editor denied any knowledge of the falsity of the statements concerning petitioner and stated that he had relied on the author's reputation and on his prior experience with the accuracy and authenticity of the author's contributions to American Opinion.

The District Court denied respondent's motion for summary judgment. Because some statements in the article constituted libel *per se* under Illinois law, the court submitted the case to the jury under instructions that withdrew from its

consideration all issues save the measure of damages. The jury awarded $50,000 to petitioner.

Following the jury verdict and on further reflection, the District Court concluded that the *New York Times* standard should govern this case even though petitioner was not a public official or public figure. It accepted respondent's contention that that privilege protected discussion of any public issue without regard to the status of a person defamed therein. Accordingly, the court entered judgment for respondent notwithstanding the jury's verdict.˜

Petitioner appealed to contest the applicability of the *New York Times* standard to this case.˜ {T}he Court of Appeals for the Seventh Circuit˜ agreed with the District Court that respondent could assert the constitutional privilege because the article concerned a matter of public interest˜. After reviewing the record, the Court of Appeals endorsed the District Court's conclusion that petitioner had failed to show by clear and convincing evidence that respondent had acted with "actual malice" as defined by *New York Times.* There was no evidence that the managing editor of American Opinion knew of the falsity of the accusations made in the article. In fact, he knew nothing about petitioner except what he learned from the article. The court correctly noted that mere proof of failure to investigate, without more, cannot establish reckless disregard for the truth. Rather, the publisher must act with a "'high degree of awareness of . . . probable falsity.'"˜ The Court of Appeals therefore affirmed˜. For the reasons stated below, we reverse.

## II

The principal issue in this case is whether a newspaper or broadcaster that publishes defamatory falsehoods about an individual who is neither a public official nor a public figure may claim a constitutional privilege against liability for the injury inflicted by those statements. The Court considered this question on the rather different set of facts presented in *Rosenbloom* v. *Metromedia, Inc.,* 403 U.S. 29 (1971). Rosenbloom, a distributor of nudist magazines, was arrested for selling allegedly obscene material while making a delivery to a retail dealer. The police obtained a warrant and seized his entire inventory of 3,000 books and magazines. He sought and obtained an injunction prohibiting further police interference with his business. He then sued a local radio station for failing to note in two of its newscasts that the 3,000 items seized were only "reportedly" or "allegedly" obscene and for broadcasting references to "the smut literature racket" and to "girliebook peddlers" in its coverage of the court proceeding for injunctive relief. He obtained a judgment against the radio station, but the Court of Appeals for the Third Circuit held the *New York Times* privilege applicable to the broadcast and reversed. 415 F. 2d 892 (1969).

This Court affirmed the decision below, but no majority could agree on a controlling rationale. The eight Justices who participated in *Rosenbloom* announced their views in five separate opinions, none of which commanded more than three votes.˜

In affirming the trial court's judgment in the instant case, the Court of Appeals relied on MR. JUSTICE BRENNAN'S conclusion for the *Rosenbloom* plurality that "all discussion and communication involving matters of public or

general concern," 403 U.S., at 44, warrant the protection from liability for defamation accorded by the rule originally enunciated in *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964).˜

Three years after *New York Times,* a majority of the Court agreed to extend the constitutional privilege to defamatory criticism of "public figures." This extension was announced in *Curtis Publishing Co.* v. *Butts* and its companion, *Associated Press* v. *Walker,* 388 U.S. 130, 162 (1967). The first case involved the Saturday Evening Post's charge that Coach Wally Butts of the University of Georgia had conspired with Coach "Bear" Bryant of the University of Alabama to fix a football game between their respective schools. *Walker* involved an erroneous Associated Press account of former Major General Edwin Walker's participation in a University of Mississippi campus riot. Because Butts was paid by a private alumni association and Walker had resigned from the Army, neither could be classified as a "public official" under *New York Times.* Although Mr. Justice Harlan announced the result in both cases, a majority of the Court agreed with Mr. Chief Justice Warren's conclusion that the *New York Times* test should apply to criticism of "public figures" as well as "public officials." The Court extended the constitutional privilege announced in that case to protect defamatory criticism of nonpublic persons who "are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." *Id.,* at 164 (Warren, C. J., concurring in result).

In his opinion for the plurality in *Rosenbloom* v. *Metromedia, Inc.,* 403 U.S. 29 (1971), MR. JUSTICE BRENNAN took the *New York Times* privilege one step further. He concluded that its protection should extend to defamatory falsehoods relating to private persons if the statements concerned matters of general or public interest. He abjured the suggested distinction between public officials and public figures on the one hand and private individuals on the other. He focused instead on society's interest in learning about certain issues: "If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not `voluntarily' choose to become involved." *Id.,* at 43. Thus, under the plurality opinion, a private citizen involuntarily associated with a matter of general interest has no recourse for injury to his reputation unless he can satisfy the demanding requirements of the *New York Times* test.˜

## III

We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues. *New York Times Co.* v. *Sullivan,* 376 U.S., at 270. They belong to that category of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived

from them is clearly outweighed by the social interest in order and morality." *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 572 (1942).

Although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate. As James Madison pointed out in the Report on the Virginia Resolutions of 1798: "Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press."^ And punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press. Our decisions recognize that a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship. Allowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties.~ The First Amendment requires that we protect some falsehood in order to protect speech that matters.

The need to avoid self-censorship by the news media is, however, not the only societal value at issue. If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation.^ Such a rule would, indeed, obviate the fear that the prospect of civil liability for injurious falsehood might dissuade a timorous press from the effective exercise of First Amendment freedoms. Yet absolute protection for the communications media requires a total sacrifice of the competing value served by the law of defamation.

The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. We would not lightly require the State to abandon this purpose, for, as MR. JUSTICE STEWART has reminded us, the individual's right to the protection of his own good name

> "reflects no more than our basic concept of the essential dignity and worth of every human being – a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system." *Rosenblatt* v. *Baer,* 383 U.S. 75, 92 (1966) (concurring opinion).

Some tension necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury. As Mr. Justice Harlan stated, "some antithesis between freedom of speech and press and libel actions persists, for libel remains premised on the content of speech and limits the freedom of the publisher to express certain sentiments, at least without guaranteeing legal proof of their substantial accuracy." *Curtis Publishing Co.* v. *Butts, supra,* at 152. In our continuing effort to define the proper accommodation between these competing concerns, we have been especially anxious to assure to the freedoms of speech and press that "breathing space" essential to their fruitful exercise. *NAACP* v. *Button,* 371 U.S. 415, 433 (1963). To that end this Court has extended a measure of strategic protection to defamatory falsehood.

The *New York Times* standard defines the level of constitutional protection appropriate to the context of defamation of a public person. Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures and those who hold governmental office may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth. This standard administers an extremely powerful antidote to the inducement to media self-censorship of the common-law rule of strict liability for libel and slander. And it exacts a correspondingly high price from the victims of defamatory falsehood. Plainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the *New York Times* test. Despite this substantial abridgment of the state law right to compensation for wrongful hurt to one's reputation, the Court has concluded that the protection of the *New York Times* privilege should be available to publishers and broadcasters of defamatory falsehood concerning public officials and public figures. *New York Times Co.* v. *Sullivan, supra; Curtis Publishing Co.* v. *Butts, supra.* We think that these decisions are correct, but we do not find their holdings justified solely by reference to the interest of the press and broadcast media in immunity from liability. Rather, we believe that the *New York Times* rule states an accommodation between this concern and the limited state interest present in the context of libel actions brought by public persons. For the reasons stated below, we conclude that the state interest in compensating injury to the reputation of private individuals requires that a different rule should obtain with respect to them.

Theoretically, of course, the balance between the needs of the press and the individual's claim to compensation for wrongful injury might be struck on a case-by-case basis. As Mr. Justice Harlan hypothesized, "it might seem, purely as an abstract matter, that the most utilitarian approach would be to scrutinize carefully every jury verdict in every libel case, in order to ascertain whether the final judgment leaves fully protected whatever First Amendment values transcend the legitimate state interest in protecting the particular plaintiff who prevailed." *Rosenbloom* v. *Metromedia, Inc.,* 403 U.S., at 63 (footnote omitted). But this approach would lead to unpredictable results and uncertain expectations, and it could render our duty to supervise the lower courts unmanageable. Because an *ad hoc* resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general application. Such rules necessarily treat alike various cases involving differences as well as similarities. Thus it is often true that not all of the considerations which justify adoption of a given rule will obtain in each particular case decided under its authority.

With that caveat we have no difficulty in distinguishing among defamation plaintiffs. The first remedy of any victim of defamation is self-help – using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are

therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.

More important than the likelihood that private individuals will lack effective opportunities for rebuttal, there is a compelling normative consideration underlying the distinction between public and private defamation plaintiffs. An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case. And society's interest in the officers of government is not strictly limited to the formal discharge of official duties. As the Court pointed out in *Garrison* v. *Louisiana,* 379 U.S., at 77, the public's interest extends to "anything which might touch on an official's fitness for office . . . . Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character."

Those classed as public figures stand in a similar position. Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare. For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

Even if the foregoing generalities do not obtain in every instance, the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. No such assumption is justified with respect to a private individual. He has not accepted public office or assumed an "influential role in ordering society." *Curtis Publishing Co.* v. *Butts,* 388 U.S., at 164 (Warren, C. J., concurring in result). He has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood. Thus, private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery.

For these reasons we conclude that the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual. The extension of the *New York Times* test proposed by the *Rosenbloom* plurality would abridge this legitimate state interest to a degree that we find unacceptable. And it would occasion the additional difficulty of forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of "general or public interest" and which do not – to determine, in the words of MR. JUSTICE MARSHALL, "what information is relevant to self-government." *Rosenbloom* v. *Metromedia, Inc.,* 403 U.S., at 79. We doubt the wisdom of committing this task to the conscience of judges. Nor does the Constitution require us to draw so thin a line between the drastic alternatives of the *New York Times* privilege and the common law of strict liability for defamatory error. The "public or general interest" test for

determining the applicability of the *New York Times* standard to private defamation actions inadequately serves both of the competing values at stake. On the one hand, a private individual whose reputation is injured by defamatory falsehood that does concern an issue of public or general interest has no recourse unless he can meet the rigorous requirements of *New York Times*. This is true despite the factors that distinguish the state interest in compensating private individuals from the analogous interest involved in the context of public persons. On the other hand, a publisher or broadcaster of a defamatory error which a court deems unrelated to an issue of public or general interest may be held liable in damages even if it took every reasonable precaution to ensure the accuracy of its assertions. And liability may far exceed compensation for any actual injury to the plaintiff, for the jury may be permitted to presume damages without proof of loss and even to award punitive damages.

We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual. This approach provides a more equitable boundary between the competing concerns involved here. It recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation. At least this conclusion obtains where, as here, the substance of the defamatory statement "makes substantial danger to reputation apparent." This phrase places in perspective the conclusion we announce today. Our inquiry would involve considerations somewhat different from those discussed above if a State purported to condition civil liability on a factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential. Cf. *Time, Inc.* v. *Hill,* 385 U.S. 374 (1967). Such a case is not now before us, and we intimate no view as to its proper resolution.

## IV

Our accommodation of the competing values at stake in defamation suits by private individuals allows the States to impose liability on the publisher or broadcaster of defamatory falsehood on a less demanding showing than that required by *New York Times*. This conclusion is not based on a belief that the considerations which prompted the adoption of the *New York Times* privilege for defamation of public officials and its extension to public figures are wholly inapplicable to the context of private individuals. Rather, we endorse this approach in recognition of the strong and legitimate state interest in compensating private individuals for injury to reputation. But this countervailing state interest extends no further than compensation for actual injury. For the reasons stated below, we hold that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.

The common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss. Under the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication. Juries may award substantial sums as compensation

for supposed damage to reputation without any proof that such harm actually occurred. The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact. More to the point, the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury.

We would not, of course, invalidate state law simply because we doubt its wisdom, but here we are attempting to reconcile state law with a competing interest grounded in the constitutional command of the First Amendment. It is therefore appropriate to require that state remedies for defamatory falsehood reach no farther than is necessary to protect the legitimate interest involved. It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury. We need not define "actual injury," as trial courts have wide experience in framing appropriate jury instructions in tort actions. Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.

We also find no justification for allowing awards of punitive damages against publishers and broadcasters held liable under state-defined standards of liability for defamation. In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views. Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship, but, unlike the former rule, punitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions. They are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence. In short, the private defamation plaintiff who established liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury.

## V

Notwithstanding our refusal to extend the *New York Times* privilege to defamation of private individuals, respondent contends that we should affirm the judgment below on the ground that petitioner is either a public official or a public figure. There is little basis for the former assertion. Several years prior to the present incident, petitioner had served briefly on housing committees appointed

by the mayor of Chicago, but at the time of publication he had never held any remunerative governmental position. Respondent admits this but argues that petitioner's appearance at the coroner's inquest rendered him a "de facto public official." Our cases recognize no such concept. Respondent's suggestion would sweep all lawyers under the *New York Times* rule as officers of the court and distort the plain meaning of the "public official" category beyond all recognition. We decline to follow it.

Respondent's characterization of petitioner as a public figure raises a different question. That designation may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.

Petitioner has long been active in community and professional affairs. He has served as an officer of local civic groups and of various professional organizations, and he has published several books and articles on legal subjects. Although petitioner was consequently well known in some circles, he had achieved no general fame or notoriety in the community. None of the prospective jurors called at the trial had ever heard of petitioner prior to this litigation, and respondent offered no proof that this response was atypical of the local population. We would not lightly assume that a citizen's participation in community and professional affairs rendered him a public figure for all purposes. Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation.

In this context it is plain that petitioner was not a public figure. He played a minimal role at the coroner's inquest, and his participation related solely to his representation of a private client. He took no part in the criminal prosecution of Officer Nuccio. Moreover, he never discussed either the criminal or civil litigation with the press and was never quoted as having done so. He plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome. We are persuaded that the trial court did not err in refusing to characterize petitioner as a public figure for the purpose of this litigation.

We therefore conclude that the *New York Times* standard is inapplicable to this case and that the trial court erred in entering judgment for respondent. Because the jury was allowed to impose liability without fault and was permitted to presume damages without proof of injury, a new trial is necessary. We reverse and remand for further proceedings in accord with this opinion.

*It is so ordered.*

**MR. JUSTICE BLACKMUN, concurring.**

˜The Court today refuses to apply *New York Times* to the private individual, as contrasted with the public official and the public figure. It thus withdraws to the factual limits of the pre-*Rosenbloom* cases. It thereby fixes the outer boundary of the *New York Times* doctrine and says that beyond that boundary, a State is free to define for itself the appropriate standard of media liability so long as it does not impose liability without fault. As my joinder in *Rosenbloom*'s plurality opinion would intimate, I sense some illogic in this.

The Court, however, seeks today to strike a balance between competing values where necessarily uncertain assumptions about human behavior color the result. Although the Court's opinion in the present case departs from the rationale of the *Rosenbloom* plurality, in that the Court now conditions a libel action by a private person upon a showing of negligence, as contrasted with a showing of willful or reckless disregard, I am willing to join, and do join, the Court's opinion and its judgment for two reasons:

1. By removing the specters of presumed and punitive damages in the absence of *New York Times* malice, the Court eliminates significant and powerful motives for self-censorship that otherwise are present in the traditional libel action.˜

2. The Court was sadly fractionated in *Rosenbloom.* A result of that kind inevitably leads to uncertainty. I feel that it is of profound importance for the Court to come to rest in the defamation area and to have a clearly defined majority position that eliminates the unsureness engendered by *Rosenbloom*'s diversity. If my vote were not needed to create a majority, I would adhere to my prior view. A definitive ruling, however, is paramount.˜

For these reasons, I join the opinion and the judgment of the Court.

**MR. CHIEF JUSTICE BURGER, dissenting.**

˜Agreement or disagreement with the law as it has evolved to this time does not alter the fact that it has been orderly development with a consistent basic rationale. In today's opinion the Court abandons the traditional thread so far as the ordinary private citizen is concerned and introduces the concept that the media will be liable for negligence in publishing defamatory statements with respect to such persons.˜

The petitioner here was performing a professional representative role as an advocate in the highest tradition of the law, and under that tradition the advocate is not to be invidiously identified with his client. The important public policy which underlies this tradition – the right to counsel – would be gravely jeopardized if every lawyer who takes an "unpopular" case, civil or criminal, would automatically become fair game for irresponsible reporters and editors who might, for example, describe the lawyer as a "mob mouthpiece" for representing a client with a serious prior criminal record, or as an "ambulance chaser" for representing a claimant in a personal injury action.

I would reverse the judgment of the Court of Appeals and remand for reinstatement of the verdict of the jury and the entry of an appropriate judgment on that verdict.

**MR. JUSTICE DOUGLAS, dissenting.**

The Court describes this case as a return to the struggle of "defin[ing] the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment." It is indeed a struggle, once described by Mr. Justice Black as "the same quagmire" in which the Court "is now helplessly struggling in the field of obscenity." *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, 171 (concurring opinion). I would suggest that the struggle is a quite hopeless one, for, in light of the command of the First Amendment, no "accommodation" of its freedoms can be "proper" except those made by the Framers themselves.˜

Since in my view the First and Fourteenth Amendments prohibit the imposition of damages upon respondent for this discussion of public affairs, I would affirm the judgment below.

**MR. JUSTICE BRENNAN, dissenting.**

˜The teaching to be distilled from our prior cases is that, while public interest in events may at times be influenced by the notoriety of the individuals involved, "[t]he public's primary interest is in the event[,] . . . the conduct of the participant and the content, effect, and significance of the conduct . . . ." *Rosenbloom, supra,* at 43. Matters of public or general interest do not "suddenly become less so merely because a private individual is involved, or because in some sense the individual did not `voluntarily' choose to become involved." *Ibid.* See *Time, Inc.* v. *Hill,* 385 U.S. 374, 388 (1967).

Although acknowledging that First Amendment values are of no less significance when media reports concern private persons' involvement in matters of public concern, the Court refuses to provide, in such cases, the same level of constitutional protection that has been afforded the media in the context of defamation of public persons.˜

{T}he flexibility which inheres in the reasonable-care standard will create the danger that a jury will convert it into "an instrument for the suppression of those `vehement, caustic, and sometimes unpleasantly sharp attacks,' . . . which must be protected if the guarantees of the First and Fourteenth Amendments are to prevail." *Monitor Patriot Co.* v. *Roy,* 401 U.S. 265, 277 (1971).˜

Since petitioner failed, after having been given a full and fair opportunity, to prove that respondent published the disputed article with knowledge of its falsity or with reckless disregard of the truth, see *ante,* at 329-330, n. 2, I would affirm the judgment of the Court of Appeals.

**MR. JUSTICE WHITE, dissenting.**

For some 200 years – from the very founding of the Nation – the law of defamation and right of the ordinary citizen to recover for false publication injurious to his reputation have been almost exclusively the business of state courts and legislatures. Under typical state defamation law, the defamed private citizen had to prove only a false publication that would subject him to hatred, contempt, or ridicule. Given such publication, general damage to reputation was presumed, while punitive damages required proof of additional facts. The law governing the defamation of private citizens remained untouched by the First

Amendment because until relatively recently, the consistent view of the Court was that libelous words constitute a class of speech wholly unprotected by the First Amendment, subject only to limited exceptions carved out since 1964.

But now, using that Amendment as the chosen instrument, the Court, in a few printed pages, has federalized major aspects of libel law by declaring unconstitutional in important respects the prevailing defamation law in all or most of the 50 States. That result is accomplished by requiring the plaintiff in each and every defamation action to prove not only the defendant's culpability beyond his act of publishing defamatory material but also actual damage to reputation resulting from the publication. Moreover, punitive damages may not be recovered by showing malice in the traditional sense of ill will; knowing falsehood or reckless disregard of the truth will now be required.

I assume these sweeping changes will be popular with the press, but this is not the road to salvation for a court of law. As I see it, there are wholly insufficient grounds for scuttling the libel laws of the States in such wholesale fashion, to say nothing of deprecating the reputation interest of ordinary citizens and rendering them powerless to protect themselves. I do not suggest that the decision is illegitimate or beyond the bounds of judicial review, but it is an ill-considered exercise of the power entrusted to this Court, particularly when the Court has not had the benefit of briefs and argument addressed to most of the major issues which the Court now decides. I respectfully dissent.~

Professor Zechariah Chafee, a noted First Amendment scholar, has persuasively argued that conditions in 1791 "do not arbitrarily fix the division between lawful and unlawful speech for all time." Free Speech in the United States 14 (1954). At the same time, however, he notes that while the Framers may have intended to abolish seditious libels and to prevent any prosecutions by the Federal Government for criticism of the Government, "the free speech clauses do not wipe out the common law as to obscenity, profanity, and defamation of individuals."

The debates in Congress and the States over the Bill of Rights are unclear and inconclusive on any articulated intention of the Framers as to the free press guarantee. We know that Benjamin Franklin, John Adams, and William Cushing favored limiting freedom of the press to truthful statements, while others such as James Wilson suggested a restatement of the Blackstone standard. Jefferson endorsed Madison's formula that "Congress shall make no law . . . abridging the freedom of speech or the press" only after he suggested:

> "The people shall not be deprived of their right to speak, to write, or *otherwise* to publish anything but false facts affecting injuriously the life, liberty, or reputation of others . . . ." F. Mott, Jefferson and the Press 14 (1943).

Doubt has been expressed that the Members of Congress envisioned the First Amendment as reaching even this far. Merin, Libel and the Supreme Court, 11 Wm. & Mary L. Rev. 371, § 379-380 (1969).~

The Court's consistent view prior to *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964), was that defamatory utterances were wholly unprotected by the First Amendment.~

The central meaning of *New York Times,* and for me the First Amendment as it relates to libel laws, is that seditious libel – criticism of government and public officials – falls beyond the police power of the State. 376 U.S., at 273-276. In a democratic society such as ours, the citizen has the privilege of criticizing his government and its officials. But neither *New York Times* nor its progeny suggest that the First Amendment intended in all circumstances to deprive the private citizen of his historic recourse to redress published falsehoods damaging to reputation or that, contrary to history and precedent, the Amendment should now be so interpreted. Simply put, the First Amendment did not confer a "license to defame the citizen." W. Douglas, The Right of the People 36 (1958).

˜In our federal system, there must be room for allowing the States to take diverse approaches to these vexing questions. We should "continue to forbear from fettering the States with an adamant rule which may embarrass them in coping with their own peculiar problems. . . ." *Mapp* v. *Ohio,* 367 U.S., at 681 (Harlan, J., dissenting)˜. Whether or not the course followed by the majority is wise, and I have indicated my doubts that it is, our constitutional scheme compels a proper respect for the role of the States in acquitting their duty to obey the Constitution. Finding no evidence that they have shirked this responsibility, particularly when the law of defamation is even now in transition, I would await some demonstration of the diminution of freedom of expression before acting.

For the foregoing reasons, I would reverse the judgment of the Court of Appeals and reinstate the jury's verdict.

Syllabus

# NATIONAL COLLEGIATE ATHLETIC ASSOCIATION *v.* TARKANIAN

CERTIORARI TO THE SUPREME COURT OF NEVADA

No. 87-1061. Argued October 5, 1988—Decided December 12, 1988

Petitioner National Collegiate Athletic Association (NCAA), an unincorporated association consisting of approximately 960 public and private universities and colleges, adopts rules governing member institutions' recruiting, admissions, academic eligibility, and financial aid standards for student athletes. The NCAA's Committee on Infractions conducts investigations, makes factual determinations, and is expressly authorized to impose penalties upon members that have violated the rules, but is not authorized to sanction a member institution's employees directly. After a lengthy investigation of allegedly improper recruiting practices by the University of Nevada, Las Vegas (UNLV), a state university, the Committee found 38 violations, including 10 by respondent Tarkanian, UNLV's basketball coach. The Committee imposed a number of sanctions upon UNLV, and requested it to show cause why additional penalties should not be imposed if it failed to suspend Tarkanian from its athletic program during a probation period. Facing demotion and a drastic cut in pay, Tarkanian brought suit in Nevada state court, alleging that he had been deprived of his Fourteenth Amendment due process rights in violation of 42 U. S. C. § 1983. Ultimately, Tarkanian obtained injunctive relief and an award of attorney's fees against both UNLV and the NCAA. Concluding that the NCAA's conduct constituted state action for jurisdictional and constitutional purposes, the Nevada Supreme Court affirmed in relevant part.

*Held:* The NCAA's participation in the events that led to Tarkanian's suspension did not constitute "state action" prohibited by the Fourteenth Amendment and was not performed "under color of" state law within the meaning of § 1983. The NCAA cannot be deemed to be a state actor on the theory that it misused power it possessed by virtue of state law, since UNLV's decision to suspend Tarkanian, while in compliance with the NCAA's rules and recommendations, did not turn the NCAA's conduct into action under color of Nevada law. Although it must be assumed that UNLV, as an NCAA member and a participant in the promulgation of the Association's rules, had some minor impact on the NCAA's policy determinations, the source of the rules adopted by the NCAA is not Nevada but the collective membership, the vast majority of which was located in other States. Moreover, UNLV's decision to

adopt the NCAA's rules did not transform them into state rules and the NCAA into a state actor, since UNLV retained plenary power to withdraw from the NCAA and to establish its own standards. The NCAA's investigation, enforcement proceedings, and consequent recommendations did not constitute state action on the theory that they resulted from a delegation of power by UNLV, because: UNLV delegated no power to the NCAA to take specific action against any University employee; UNLV and the NCAA acted as adversaries throughout the proceedings; the NCAA enjoyed no governmental powers to facilitate its investigation; and the NCAA did not—indeed, could not—directly discipline Tarkanian, but could only threaten additional sanctions against UNLV if the University chose not to suspend its coach. Furthermore, even assuming the truth of Tarkanian's argument that the power of the NCAA is so great that UNLV had no practical alternative but to comply with the Association's demands, it does not follow that the NCAA was therefore acting under color of state law. Pp. 191–199.

103 Nev. 331, 741 P. 2d 1345, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BLACKMUN, SCALIA, and KENNEDY, JJ., joined. WHITE, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and O'CONNOR, JJ., joined, *post*, p. 199.

*Rex E. Lee* argued the cause for petitioner. With him on the briefs were *George H. Gangwere*, *James H. McLarney*, and *Daniel L. Sailler*.

*Samuel S. Lionel* argued the cause for respondent. With him on the brief were *David N. Frederick* and *Mark A. Solomon*.

JUSTICE STEVENS delivered the opinion of the Court.

When he became head basketball coach at the University of Nevada, Las Vegas (UNLV), in 1973, Jerry Tarkanian inherited a team with a mediocre 14–14 record. App. 188, 205. Four years later the team won 29 out of 32 games and placed third in the championship tournament sponsored by the National Collegiate Athletic Association (NCAA), to which UNLV belongs. *Id.*, at 188.

Yet in September 1977 UNLV informed Tarkanian that it was going to suspend him. No dissatisfaction with Tarkan-

ian, once described as "the 'winningest' active basketball coach," *id.*, at 19, motivated his suspension. Rather, the impetus was a report by the NCAA detailing 38 violations of NCAA rules by UNLV personnel, including 10 involving Tarkanian. The NCAA had placed the university's basketball team on probation for two years and ordered UNLV to show cause why the NCAA should not impose further penalties unless UNLV severed all ties during the probation between its intercollegiate athletic program and Tarkanian.

Facing demotion and a drastic cut in pay,[1] Tarkanian brought suit in Nevada state court, alleging that he had been deprived of his Fourteenth Amendment due process rights in violation of 42 U. S. C. § 1983.[2] Ultimately Tarkanian obtained injunctive relief and an award of attorney's fees against both UNLV and the NCAA.[3] 103 Nev. 331, 741 P. 2d 1345 (1987) *(per curiam)*. NCAA's liability may be upheld only if its participation in the events that led to

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[1] The trial court found that Tarkanian, as head basketball coach,

"is annually paid (in lieu of his salary as a professor) $125,000, plus 10% of the net proceeds received by UNLV for participation in NCAA-authorized championship games, plus fees from basketball camps and clinics, product endorsements, and income realized from writing a newspaper column, speaking on a radio program entitled 'THE JERRY TARKANIAN SHOW,' and appearing on a television program bearing the same name." App. 18.

That compensation was "entirely contingent on [Tarkanian's] continued status as the Head Basketball Coach at UNLV." As a tenured professor alone, he would have earned about $53,000 a year, the court found. *Ibid.*

[2] That section provides, in part:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[3] The fees were awarded pursuant to 42 U. S. C. § 1988, which authorizes a court in its discretion to award the prevailing party in an action brought under § 1983 a reasonable attorney's fee as a part of the costs.

Tarkanian's suspension constituted "state action" prohibited by the Fourteenth Amendment and was performed "under color of" state law within the meaning of § 1983.[4] We granted certiorari to review the Nevada Supreme Court's holding that the NCAA engaged in state action when it conducted its investigation and recommended that Tarkanian be disciplined. 484 U. S. 1058 (1988). We now reverse.[5]

## I

In order to understand the four separate proceedings that gave rise to the question we must decide, it is useful to begin with a description of the relationship among the three parties—Tarkanian, UNLV, and the NCAA.

Tarkanian initially was employed on a year-to-year basis but became a tenured professor in 1977. He receives an annual salary with valuable fringe benefits, and his status as a highly successful coach enables him to earn substantial additional income from sports-related activities such as broadcasting and the sponsorship of products.

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[4] In this case the under-color-of-law requirement of 42 U. S. C. § 1983 and the state-action requirement of the Fourteenth Amendment are equivalent. See *Rendell-Baker* v. *Kohn*, 457 U. S. 830, 838 (1982); see also *Lugar* v. *Edmondson Oil Co.*, 457 U. S. 922, 928–935 (1982).

[5] Although the NCAA's status as a state or private actor is a novel issue in this Court, lower federal courts have entertained the question for a number of years. Initially, Federal Courts of Appeals held that the NCAA was a state actor for § 1983 purposes. *E. g.*, *Regents of University of Minnesota* v. *NCAA*, 560 F. 2d 352 (CA8), cert. dism'd, 434 U. S. 978 (1977); *Howard University* v. *NCAA*, 166 U. S. App. D. C. 260, 510 F. 2d 213 (1975); *Parish* v. *NCAA*, 506 F. 2d 1028 (CA5 1975); *Associated Students, Inc.* v. *NCAA*, 493 F. 2d 1251 (CA9 1974) *(per curiam)*. Since our decisions in *Lugar* v. *Edmondson Oil Co.*, *supra*, *Rendell-Baker* v. *Kohn*, *supra*, and *Blum* v. *Yaretsky*, 457 U. S. 991 (1982), all issued on the same day, lower courts have held to the contrary. *E. g.*, *McCormack* v. *NCAA*, 845 F. 2d 1338 (CA5 1988); *Karmanos* v. *Baker*, 816 F. 2d 258 (CA6 1987); *Graham* v. *NCAA*, 804 F. 2d 953 (CA6 1986); *Arlosoroff* v. *NCAA*, 746 F. 2d 1019 (CA4 1984). See *Spath* v. *NCAA*, 728 F. 2d 25, 28 (CA1 1984) (dictum).

~~UNLV is a branch of the University of Nevada, a state-funded institution. The university is organized and operated pursuant to provisions of Nevada's State Constitution, statutes, and regulations. In performing their official functions, the executives of UNLV unquestionably act under color of state law.~~

The NCAA is an unincorporated association of approximately 960 members, including virtually all public and private universities and 4-year colleges conducting major athletic programs in the United States. Basic policies of the NCAA are determined by the members at annual conventions. Between conventions, the Association is governed by its Council, which appoints various committees to implement specific programs.

One of the NCAA's fundamental policies "is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body, and by so doing, retain a clear line of demarcation between college athletics and professional sports." App. 80. It has therefore adopted rules, which it calls "legislation," *ibid.*, governing the conduct of the intercollegiate athletic programs of its members. This NCAA legislation applies to a variety of issues, such as academic standards for eligibility, admissions, financial aid, and the recruiting of student athletes. By joining the NCAA, each member agrees to abide by and to enforce such rules.

The NCAA's bylaws provide that its enforcement program shall be administered by a Committee on Infractions. The Committee supervises an investigative staff, makes factual determinations concerning alleged rule violations, and is expressly authorized to "impose appropriate penalties on a member found to be in violation, or recommend to the Council suspension or termination of membership."[6] In particu-

[6] App. 98. Among the sanctions that the Committee may impose "against an institution" are:

"(1) Reprimand and censure;

lar, the Committee may order a member institution to show cause why that member should not suffer further penalties unless it imposes a prescribed discipline on an employee; it is not authorized, however, to sanction a member institution's employees directly.[7] The bylaws also provide that representatives of member institutions "are expected to cooperate fully" with the administration of the enforcement program. *Id.*, at 97. The bylaws do not purport to confer any subpoena power on the Committee or its investigators. They state:

> "The enforcement procedures are an essential part of the intercollegiate athletic program of each member institu-

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"(2) Probation for one year;

"(3) Probation for more than one year;

"(4) Ineligibility for one or more National Collegiate Championship events;

"(5) Ineligibility for invitational and postseason meets and tournaments;

"(6) Ineligibility for any television programs subject to the Association's control or administration;

"(7) Ineligibility of the member to vote or its personnel to serve on committees of the Association, or both;

"(8) Prohibition against an intercollegiate sports team or teams participating against outside competition for a specified period;

"(9) Prohibition against the recruitment of prospective student-athletes for a sport or sports for a specified period . . . ." *Id.*, at 103–104.

[7] Upon finding that misconduct by an employee of a member institution caused NCAA rules to be violated, the Committee may require the member to "show cause why:

"(i) a penalty or an additional penalty should not be imposed if, in the opinion of the Committee (or Council), it does not take appropriate disciplinary or corrective action against athletic department personnel involved in the infractions case, any other institutional employee if the circumstances warrant, or representatives of the institution's athletic interests; or

"(ii) a recommendation should not be made to the membership that the institution's membership in the Association be suspended or terminated if, in the opinion of the Committee (or Council), it does not take appropriate disciplinary or corrective action against the head coach of the sport involved, any other institutional employee if the circumstances warrant, or representatives of the institution's athletic interests." *Id.*, at 104.

> tion and require full and complete disclosure by all institutional representatives of any relevant information requested by the NCAA investigative staff, Committee on Infractions or Council during the course of an inquiry." *Ibid.*

During its investigation of UNLV, the Committee on Infractions included three law professors, a mathematics professor, and the dean of a graduate school. Four of them were on the faculties of state institutions; one represented a private university.

*The NCAA Investigation of UNLV*

On November 28, 1972, the Committee on Infractions notified UNLV's president that it was initiating a preliminary inquiry into alleged violations of NCAA requirements by UNLV. As a result of that preliminary inquiry, some three years later the Committee decided that an "Official Inquiry" was warranted and so advised the UNLV president on February 25, 1976. That advice included a series of detailed allegations concerning the recruitment of student athletes during the period between 1971 and 1975. Many of the allegations implicated Tarkanian. It requested UNLV to investigate and provide detailed information concerning each alleged incident.

With the assistance of the Attorney General of Nevada and private counsel, UNLV conducted a thorough investigation of the charges. On October 27, 1976, it filed a comprehensive response containing voluminous exhibits and sworn affidavits. The response denied all of the allegations and specifically concluded that Tarkanian was completely innocent of wrongdoing. Thereafter, the Committee conducted four days of hearings at which counsel for UNLV and Tarkanian presented their views of the facts and challenged the credibility of the NCAA investigators and their informants. Ultimately the Committee decided that many of the charges could not be supported, but it did find 38 violations of NCAA

rules, including 10 committed by Tarkanian. Most serious was the finding that Tarkanian had violated the University's obligation to provide full cooperation with the NCAA investigation.[8] The Committee's findings and proposed discipline were summarized in great detail in its so-called "Confidential Report No. 123(47)." App. 122–204.

The Committee proposed a series of sanctions against UNLV, including a 2-year period of probation during which its basketball team could not participate in postseason games or appear on television. The Committee also requested UNLV to show cause why additional penalties should not be imposed against UNLV if it failed to discipline Tarkanian by removing him completely from the University's intercollegiate athletic program during the probation period. UNLV appealed most of the Committee's findings and proposed sanctions to the NCAA Council. After hearing arguments from attorneys representing UNLV and Tarkanian, the Council on August 25, 1977, unanimously approved the Committee's investigation and hearing process and adopted all its recommendations.

*UNLV's Discipline of Tarkanian*

Promptly after receiving the NCAA report, the president of UNLV directed the University's vice president to schedule a hearing to determine whether the Committee's recommended sanctions should be applied. Tarkanian and UNLV were represented at that hearing; the NCAA was not. Although the vice president expressed doubt concerning the sufficiency of the evidence supporting the Committee's findings,[9] he concluded that "given the terms of our adherence to

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[8] See *id.*, at 141–150, 190, 196.

[9] "Most serious is the charge that Coach Tarkanian attempted to frustrate the NCAA's application of the rules by getting people to 'change their story' or to fabricate bodies of countervailing evidence. I am not convinced that the NCAA investigation adequately supports this charge and yet we must remember that the NCAA infractions committee and the

the NCAA we cannot substitute—biased as we must be—our own judgment on the credibility of witnesses for that of the infractions committee and the Council." *Id.*, at 75. With respect to the proposed sanctions, he advised the president that he had three options:

> "1. Reject the sanction requiring us to disassociate Coach Tarkanian from the athletic program and take the risk of still heavier sanctions, *e. g.*, possible extra years of probation.
>
> "2. Recognize the University's delegation to the NCAA of the power to act as ultimate arbiter of these matters, thus reassigning Mr. Tarkanian from his present position—though tenured and without adequate notice—even while believing that the NCAA was wrong.
>
> "3. Pull out of the NCAA completely on the grounds that you will not execute what you hold to be their unjust judgments." *Id.*, at 76.

Pursuant to the vice president's recommendation, the president accepted the second option and notified Tarkanian that he was to "be completely severed of any and all relations, formal or informal, with the University's Intercollegiate athletic program during the period of the University's NCAA probation." *Id.*, at 70.

*Tarkanian's Lawsuit Against UNLV*

The day before his suspension was to become effective, Tarkanian filed an action in Nevada state court for declaratory and injunctive relief against UNLV and a number of its officers. He alleged that these defendants had, in violation of 42 U. S. C. § 1983, deprived him of property and liberty without the due process of law guaranteed by the Fourteenth Amendment to the United States Constitution. Based on a stipulation of facts and the testimony offered by Tarkanian,

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NCAA Council, both composed of distinguished scholars, administrators, and lawyers, believed otherwise." *Id.*, at 72.

the trial court enjoined UNLV from suspending Tarkanian on the ground that he had been denied procedural and substantive due process of law. UNLV appealed.

The NCAA, which had not been joined as a party, filed an *amicus curiae* brief arguing that there was no actual controversy between Tarkanian and UNLV; thus, the suit should be dismissed. Alternatively, the NCAA contended that the trial court had exceeded its jurisdiction by effectively invalidating the enforcement proceedings of the NCAA, even though the Association was not a party to the suit. Should a controversy exist, the NCAA argued, it was a necessary party to litigate the scope of any relief. Finally, it contested the trial court's conclusion that Tarkanian had been denied due process. The Nevada Supreme Court concluded that there was an actual controversy but agreed that the NCAA was a necessary party and therefore reversed and remanded to permit joinder of the NCAA. *University of Nevada* v. *Tarkanian*, 95 Nev. 389, 594 P. 2d 1159 (1979).

*The Lawsuit Against NCAA*

Tarkanian consequently filed a second amended complaint adding the NCAA. The defendants promptly removed the suit to Federal District Court on the ground that joinder of the NCAA substantially had altered the nature of the litigation. The District Court held, however, that the original defendants had waived their right to remove the suit when it was first filed, and therefore granted Tarkanian's motion to remand the case to the state court. After a 4-year delay, the trial judge conducted a 2-week bench trial and resolved the issues in Tarkanian's favor. The court concluded that NCAA's conduct constituted state action for jurisdictional and constitutional purposes, and that its decision was arbitrary and capricious. It reaffirmed its earlier injunction barring UNLV from disciplining Tarkanian or otherwise enforcing the Confidential Report. Additionally, it enjoined the NCAA from conducting "any further proceedings against the

University," from enforcing its show-cause order, and from taking any other action against the University that had been recommended in the Confidential Report. App. 34.

Two weeks after the trial court's opinion was entered, Tarkanian filed a petition for attorney's fees pursuant to 42 U. S. C. § 1988. Asserting that this was the first time Tarkanian had claimed relief under § 1988, the NCAA again sought removal to Federal District Court on the ground that the litigation had changed substantially. When the university defendants declined to join the removal petition, the NCAA contended that they should be realigned as plaintiffs because they actually wanted Tarkanian to prevail. The District Court, however, again ordered the litigation remanded, and the Ninth Circuit agreed. App. to Pet. for Cert. A120. Even before the Ninth Circuit ruled, the Nevada trial court had awarded Tarkanian attorney's fees of almost $196,000, 90% of which was to be paid by the NCAA. App. 41–42. The NCAA appealed both the injunction and the fee order. Not surprisingly, UNLV, which had scored a total victory except for its obligation to pay a fraction of Tarkanian's fees, did not appeal.

The Nevada Supreme Court agreed that Tarkanian had been deprived of both property and liberty protected by the Constitution and that he was not afforded due process before suspension. It thus affirmed the trial court's injunction insofar as it pertained to Tarkanian, but narrowed its scope "only to prohibit enforcement of the penalties imposed upon Tarkanian in Confidential Report No. 123(47) and UNLV's adoption of those penalties." 103 Nev., at 343, 741 P. 2d, at 1353. The court also reduced the award of attorney's fees.[10]

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[10] The court held the NCAA was not liable for fees Tarkanian incurred during the first trial and first appeal to the State Supreme Court. Not only did those events occur before the NCAA was a party to the litigation, the court explained, but since the trial court's judgment was reversed, Tarkanian had not prevailed, and thus was not eligible for fees pursuant to § 1988. In a later opinion, the Supreme Court ordered that Tarkanian be

As a predicate for its disposition, the State Supreme Court held that the NCAA had engaged in state action. Several strands of argument supported this holding. First, the court assumed that it was reviewing "UNLV's and the NCAA's imposition of penalties against Tarkanian," *id.*, at 335, 741 P. 2d, at 1347, rather than the NCAA's proposed sanctions against UNLV if it failed to discipline Tarkanian appropriately. Second, it regarded the NCAA's regulatory activities as state action because "many NCAA member institutions were either public or government supported." *Ibid.* Third, it stated that the right to discipline a public employee "is traditionally the exclusive prerogative of the state" and that UNLV could not escape its responsibility for such disciplinary action by delegating that duty to a private entity. *Id.*, at 336, 741 P. 2d, at 1348. The court next pointed to our opinion in *Lugar* v. *Edmondson Oil Co.*, 457 U. S. 922, 937 (1982), in which we held that the deprivation of a federal right may be attributed to the State if it resulted from a state-created rule and the party charged with the deprivation can fairly be said to a state actor. Summing up its holding that the NCAA's activities constituted state action, the Nevada Supreme Court stated:

> "The first prong [of *Lugar*] is met because no third party could impose disciplinary sanctions upon a state university employee unless the third party received the right or privilege from the university. Thus, the deprivation which Tarkanian alleges is caused by the exercise of a right or privilege created by the state. Also, in the instant case, both UNLV and the NCAA must be considered state actors. By delegating authority to the NCAA over athletic personnel decisions and by imposing the NCAA sanctions against Tarkanian, UNLV acted

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allowed additional fees for services performed on his second appeal before that court.

jointly with the NCAA." 103 Nev., at 337, 741 P. 2d, at 1349.

II

Embedded in our Fourteenth Amendment jurisprudence is a dichotomy between state action, which is subject to scrutiny under the Amendment's Due Process Clause,[11] and private conduct, against which the Amendment affords no shield, no matter how unfair that conduct may be. *Shelley* v. *Kraemer*, 334 U. S. 1, 13 (1948); see *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345, 349 (1974). As a general matter the protections of the Fourteenth Amendment do not extend to "private conduct abridging individual rights." *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 722 (1961).

"Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law" and avoids the imposition of responsibility on a State for conduct it could not control. *Lugar*, 457 U. S., at 936–937. When Congress enacted § 1983 as the statutory remedy for violations of the Constitution, it specified that the conduct at issue must have occurred "under color of" state law; thus, liability attaches only to those wrongdoers "who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." *Monroe* v. *Pape*, 365 U. S. 167, 172 (1961). As we stated in *United States* v. *Classic*, 313 U. S. 299, 326 (1941):

> "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."

In this case Tarkanian argues that the NCAA was a state actor because it misused power that it possessed by virtue of

[11] "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U. S. Const., Amdt. 14, § 1.

state law. He claims specifically that UNLV delegated its own functions to the NCAA, clothing the Association with authority both to adopt rules governing UNLV's athletic programs and to enforce those rules on behalf of UNLV. Similarly, the Nevada Supreme Court held that UNLV had delegated its authority over personnel decisions to the NCAA. Therefore, the court reasoned, the two entities acted jointly to deprive Tarkanian of liberty and property interests, making the NCAA as well as UNLV a state actor.

These contentions fundamentally misconstrue the facts of this case. In the typical case raising a state-action issue, a private party has taken the decisive step that caused the harm to the plaintiff, and the question is whether the State was sufficiently involved to treat that decisive conduct as state action. This may occur if the State creates the legal framework governing the conduct, *e. g.*, *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U. S. 601 (1975); if it delegates its authority to the private actor, *e. g.*, *West* v. *Atkins*, 487 U. S. 42 (1988); or sometimes if it knowingly accepts the benefits derived from unconstitutional behavior, *e. g.*, *Burton* v. *Wilmington Parking Authority*, *supra*. Thus, in the usual case we ask whether the State provided a mantle of authority that enhanced the power of the harm-causing individual actor.[12]

This case uniquely mirrors the traditional state-action case. Here the final act challenged by Tarkanian—his suspension—was committed by UNLV. A state university without question is a state actor. When it decides to impose a serious disciplinary sanction upon one of its tenured employees, it must comply with the terms of the Due Process Clause of the Fourteenth Amendment to the Federal Constitution. Accord, *Cleveland Board of Education* v. *Louder-*

[12] *E. g.*, *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345, 351 (1974) ("[T]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may fairly be treated as that of the State itself").

*mill*, 470 U. S. 532 (1985); *Board of Regents of State Colleges* v. *Roth*, 408 U. S. 564 (1972). Thus when UNLV notified Tarkanian that he was being separated from all relations with the university's basketball program, it acted under color of state law within the meaning of 42 U. S. C. § 1983.

The mirror image presented in this case requires us to step through an analytical looking glass to resolve the case. Clearly UNLV's conduct was influenced by the rules and recommendations of the NCAA, the private party. But it was UNLV, the state entity, that actually suspended Tarkanian. Thus the question is not whether UNLV participated to a critical extent in the NCAA's activities, but whether UNLV's actions in compliance with the NCAA rules and recommendations turned the NCAA's conduct into state action.

We examine first the relationship between UNLV and the NCAA regarding the NCAA's rulemaking. UNLV is among the NCAA's members and participated in promulgating the Association's rules; it must be assumed, therefore, that Nevada had some impact on the NCAA's policy determinations. Yet the NCAA's several hundred other public and private member institutions each similarly affected those policies. Those institutions, the vast majority of which were located in States other than Nevada, did not act under color of Nevada law. It necessarily follows that the source of the legislation adopted by the NCAA is not Nevada but the collective membership, speaking through an organization that is independent of any particular State.[13] Cf. *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U. S. 492, 501

[13] The situation would, of course, be different if the membership consisted entirely of institutions located within the same State, many of them public institutions created by the same sovereign. See *Clark* v. *Arizona Interscholastic Association*, 695 F. 2d 1126 (CA9 1982), cert. denied, 464 U. S. 818 (1983); *Louisiana High School Athletic Association* v. *St. Augustine High School*, 396 F. 2d 224 (CA5 1968). The dissent apparently agrees that the NCAA was not acting under color of state law in its relationships with private universities, which constitute the bulk of its membership. See *post*, at 202, n. 2.

(1988) ("Whatever *de facto* authority the [private standard-setting] Association enjoys, no official authority has been conferred on it by any government . . .").

State action nonetheless might lie if UNLV, by embracing the NCAA's rules, transformed them into state rules and the NCAA into a state actor. See *Lugar*, 457 U. S., at 937. UNLV engaged in state action when it adopted the NCAA's rules to govern its own behavior, but that would be true even if UNLV had taken no part in the promulgation of those rules. In *Bates* v. *State Bar of Arizona*, 433 U. S. 350 (1977), we established that the State Supreme Court's enforcement of disciplinary rules transgressed by members of its own bar was state action. Those rules had been adopted *in toto* from the American Bar Association Code of Professional Responsibility. *Id.*, at 360, n. 12. It does not follow, however, that the ABA's formulation of those disciplinary rules was state action. The State Supreme Court retained plenary power to reexamine those standards and, if necessary, to reject them and promulgate its own. See *id.*, at 362.[14] So here, UNLV retained the authority to withdraw

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[14] Petitioners in *Bates*, contended that enforcement of disciplinary rules circumscribing attorney advertising violated §§ 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2, and the First Amendment, made applicable to the States by the Fourteenth Amendment. 433 U. S., at 353. The Court unanimously concluded that state action existed in deciding that by the doctrine enunciated in *Parker* v. *Brown*, 317 U. S. 341 (1943), respondent was immune from Sherman Act liability. The Court reached the merits of petitioners' First and Fourteenth Amendment claims without discussing whether state action existed for Fourteenth Amendment purposes. 433 U. S., at 363–384.

Although by no means identical, analysis of the existence of state action justifying immunity from antitrust liability is somewhat similar to the state-action inquiry conducted pursuant to § 1983 and the Fourteenth Amendment. In both contexts, for example, courts examine whether the rule in question is a rule of the State. Compare *Hoover* v. *Ronwin*, 466 U. S. 558, 569 (1984) ("[T]he Court has required a showing that the conduct is pursuant to a 'clearly articulated and affirmatively expressed state policy' to replace competition with regulation") (citation omitted), with *Lugar*,

from the NCAA and establish its own standards. The university alternatively could have stayed in the Association and worked through the Association's legislative process to amend rules or standards it deemed harsh, unfair, or unwieldy.[15] Neither UNLV's decision to adopt the NCAA's standards nor its minor role in their formulation is a sufficient reason for concluding that the NCAA was acting under color of Nevada law when it promulgated standards governing athlete recruitment, eligibility, and academic performance.

Tarkanian further asserts that the NCAA's investigation, enforcement proceedings, and consequent recommendations constituted state action because they resulted from a delegation of power by UNLV. UNLV, as an NCAA member, subscribed to the statement in the Association's bylaws that NCAA "enforcement procedures are an essential part of the intercollegiate athletic program of each member institution." App. 97. It is, of course, true that a State may delegate authority to a private party and thereby make that party a state actor. Thus, we recently held that a private physician who had contracted with a state prison to attend to the inmates' medical needs was a state actor. *West* v. *Atkins*, 487 U. S. 42 (1988). But UNLV delegated no power to the

457 U. S., at 937 ("[T]he deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible"). The degree to which the activities of the state entity and the arguably private entity are intertwined also is pertinent. Compare *Hoover*, 466 U. S., at 569–570, with *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 721–726 (1961).

[15] Furthermore, the NCAA's bylaws permit review of penalties, even after they are imposed, "upon a showing of newly discovered evidence which is directly related to the findings in the case, or that there was a prejudicial error in the procedure which was followed in the processing of the case by the Committee." App. 107. UNLV could have sought such a review, perhaps on the theory that the NCAA's investigator was biased against Tarkanian, as the Nevada trial court found in 1984. *Id.*, at 20. The NCAA Committee on Infractions was authorized to "reduce or eliminate any penalty" if the university had prevailed. *Id.*, at 108.

NCAA to take specific action against any university employee. The commitment by UNLV to adhere to NCAA enforcement procedures was enforceable only by sanctions that the NCAA might impose on UNLV itself.

Indeed, the notion that UNLV's promise to cooperate in the NCAA enforcement proceedings was tantamount to a partnership agreement or the transfer of certain university powers to the NCAA is belied by the history of this case. It is quite obvious that UNLV used its best efforts to retain its winning coach—a goal diametrically opposed to the NCAA's interest in ascertaining the truth of its investigators' reports. During the several years that the NCAA investigated the alleged violations, the NCAA and UNLV acted much more like adversaries than like partners engaged in a dispassionate search for the truth. The NCAA cannot be regarded as an agent of UNLV for purposes of that proceeding. It is more correctly characterized as an agent of its remaining members which, as competitors of UNLV, had an interest in the effective and evenhanded enforcement of the NCAA's recruitment standards. Just as a state-compensated public defender acts in a private capacity when he or she represents a private client in a conflict against the State, *Polk County* v. *Dodson*, 454 U. S. 312, 320 (1981), the NCAA is properly viewed as a private actor at odds with the State when it represents the interests of its entire membership in an investigation of one public university.[16]

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[16] Tarkanian argues that UNLV and the NCAA were "joint participants" in state action. Brief for Respondent 42. He would draw support from *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961), in which a lease relationship between a private restaurant and a publicly owned parking structure entailed "an incidental variety of mutual benefits," *id.*, at 724: tax exemptions for the restaurant, rent payments for the parking authority, and increased business for both. Because of this interdependence, we held, the restaurant and parking authority jointly violated the Fourteenth Amendment when the restaurant discriminated on account of race. *Id.*, at 725. In the case before us the state and private parties' relevant interests do not coincide, as they did in *Burton;* rather, they have clashed through-

The NCAA enjoyed no governmental powers to facilitate its investigation.[17] It had no power to subpoena witnesses, to impose contempt sanctions, or to assert sovereign authority over any individual. Its greatest authority was to threaten sanctions against UNLV, with the ultimate sanction being expulsion of the university from membership. Contrary to the premise of the Nevada Supreme Court's opinion, the NCAA did not—indeed, could not—directly discipline Tarkanian or any other state university employee.[18] The ex-

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out the investigation, the attempt to discipline Tarkanian, and this litigation. UNLV and the NCAA were antagonists, not joint participants, and the NCAA may not be deemed a state actor on this ground.

[17] In *Dennis* v. *Sparks*, 449 U. S. 24 (1980), on which the dissent relies, the parties had entered into a corrupt agreement to perform a judicial act. As we explained:

"[H]ere the allegations were that an official act of the defendant judge was the product of a corrupt conspiracy involving bribery of the judge. Under these allegations, the private parties conspiring with the judge were acting under color of state law; and it is of no consequence in this respect that the judge himself is immune from damages liability. Immunity does not change the character of the judge's action or that of his co-conspirators. Indeed, his immunity is dependent on the challenged conduct being an official judicial act within his statutory jurisdiction, broadly construed. Private parties who corruptly conspire with a judge in connection with such conduct are thus acting under color of law . . . ." *Id.*, at 28–29 (footnote and citations omitted).

In this case there is no suggestion of any impropriety respecting the agreement between the NCAA and UNLV. Indeed the dissent seems to assume that the NCAA's liability as a state actor depended not on its initial agreement with UNLV, but on whether UNLV ultimately accepted the NCAA's recommended discipline of Tarkanian. See *post*, at 203. In contrast, the conspirators in *Dennis* became state actors when they formed the corrupt bargain with the judge, and remained so through completion of the conspiracy's objectives. Cf. *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 149–150, and n. 5 (1970) (private restaurant that denied plaintiff service in violation of federal law would be liable as state actor upon proof that it conspired with police officer to deprive plaintiff of her constitutional rights).

[18] Tarkanian urges us to hold, as did the Nevada Supreme Court, that the NCAA by its rules and enforcement procedures has usurped a tradi-

press terms of the Confidential Report did not demand the suspension unconditionally; rather, it requested "the University . . . to show cause" why the NCAA should not impose additional penalties if UNLV declines to suspend Tarkanian. App. 180. Even the university's vice president acknowledged that the Report gave the university options other than suspension: UNLV could have retained Tarkanian and risked additional sanctions, perhaps even expulsion from the NCAA, or it could have withdrawn voluntarily from the Association.

Finally, Tarkanian argues that the power of the NCAA is so great that the UNLV had no practical alternative to compliance with its demands. We are not at all sure this is true,[19] but even if we assume that a private monopolist can

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tional, essential state function. Quite properly, he does not point to the NCAA's overriding function of fostering amateur athletics at the college level. For while we have described that function as "critical," *NCAA* v. *Board of Regents of Univ. of Okla.*, 468 U. S. 85, 120 (1984), by no means is it a traditional, let alone an exclusive, state function. Cf. *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Committee*, 483 U. S. 522, 545 (1987) ("Neither the conduct nor the coordination of amateur sports has been a traditional government function"). Tarkanian argues instead that the NCAA has assumed the State's traditional and exclusive power to discipline its employees. "[A]s to state employees connected with intercollegiate athletics, the NCAA requires that its standards, procedures and determinations *become* the State's standards, procedures and determinations for disciplining state employees," he contends. "The State is *obligated* to impose NCAA standards, procedures and determinations making the NCAA a joint participant in the State's suspension of Tarkanian." Brief for Respondent 34–35 (emphases in original).

This argument overlooks the fact that the NCAA's own legislation prohibits it from taking any direct action against Tarkanian. Moreover, suspension of Tarkanian is one of many recommendations in the Confidential Report. Those recommendations as a whole were intended to bring UNLV's basketball program into compliance with NCAA rules. Suspension of Tarkanian was but one means toward achieving that goal.

[19] The university's desire to remain a powerhouse among the Nation's college basketball teams is understandable, and nonmembership in the

impose its will on a state agency by a threatened refusal to deal with it, it does not follow that such a private party is therefore acting under color of state law. Cf. *Jackson*, 419 U. S., at 351–352 (State's conferral of monopoly status does not convert private party into state actor).

In final analysis the question is whether "the conduct allegedly causing the deprivation of a federal right [can] be fairly attributable to the State." *Lugar*, 457 U. S., at 937. It would be ironic indeed to conclude that the NCAA's imposition of sanctions against UNLV—sanctions that UNLV and its counsel, including the Attorney General of Nevada, steadfastly opposed during protracted adversary proceedings—is fairly attributable to the State of Nevada. It would be more appropriate to conclude that UNLV has conducted its athletic program under color of the policies adopted by the NCAA, rather than that those policies were developed and enforced under color of Nevada law.

The judgment of the Nevada Supreme Court is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

*It is so ordered.*

JUSTICE WHITE, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE O'CONNOR join, dissenting.

All agree that UNLV, a public university, is a state actor, and that the suspension of Jerry Tarkanian, a public employee, was state action. The question here is whether the NCAA acted jointly with UNLV in suspending Tarkanian and thereby also became a state actor. I would hold that it did.

I agree with the majority that this case is different on its facts from many of our prior state-action cases. As the majority notes, in our "typical case raising a state-action issue, a private party has taken the decisive step that caused the

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NCAA obviously would thwart that goal. But that UNLV's options were unpalatable does not mean that they were nonexistent.

harm to the plaintiff." *Ante*, at 192. In this case, however, which in the majority's view "uniquely mirrors the traditional state-action case," *ibid.*, the final act that caused the harm to Tarkanian was committed, not by a private party, but by a party conceded to be a state actor. Because of this difference, the majority finds it necessary to "step through an analytical looking glass" to evaluate whether the NCAA was a state actor. *Ante*, at 193.

But the situation presented by this case is not unknown to us and certainly is not unique. In both *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144 (1970), and *Dennis* v. *Sparks*, 449 U. S. 24 (1980), we faced the question whether private parties could be held to be state actors in cases in which the final or decisive act was carried out by a state official. In both cases we held that the private parties could be found to be state actors, if they were "jointly engaged with state officials in the challenged action." *Id.*, at 27–28.

The facts of *Dennis* are illustrative. In *Dennis*, a state trial judge enjoined the production of minerals from oil leases owned by the plaintiff. The injunction was later dissolved on appeal as having been issued illegally. The plaintiff then filed suit under 42 U. S. C. § 1983, alleging that the judge had conspired with the party seeking the original injunction—a private corporation—the sole owner of the corporation, and the two sureties on the injunction bond to deprive the plaintiff of due process by corruptly issuing the injunction. We held unanimously that under the facts as alleged the private parties were state actors because they were "willful participant[s] in joint action with the State or its agents." 449 U. S., at 27. See also *Adickes*, *supra*, at 152 (plaintiff entitled to relief under § 1983 against private party if she can prove that private party and police officer "reached an understanding" to cause her arrest on impermissible grounds).

On the facts of the present case, the NCAA acted jointly with UNLV in suspending Tarkanian. First, Tarkanian was suspended for violations of NCAA rules, which UNLV embraced in its agreement with the NCAA. As the Nevada

Supreme Court found in its first opinion in this case, *University of Nevada* v. *Tarkanian*, 95 Nev. 389, 391, 594 P. 2d 1159, 1160 (1979), "[a]s a member of the NCAA, UNLV contractually agrees to administer its athletic program in accordance with NCAA legislation." Indeed, NCAA rules provide that NCAA "enforcement procedures are an essential part of the intercollegiate athletic program of each member institution." App. 97.

Second, the NCAA and UNLV also agreed that the NCAA would conduct the hearings concerning violations of its rules. Although UNLV conducted its own investigation into the recruiting violations alleged by the NCAA, the NCAA procedures provide that it is the NCAA Committee on Infractions that "determine[s] facts related to alleged violations," subject to an appeal to the NCAA Council. *Id.*, at 98, 101. As a result of this agreement, the NCAA conducted the very hearings the Nevada Supreme Court held to have violated Tarkanian's right to procedural due process.[1]

Third, the NCAA and UNLV agreed that the findings of fact made by the NCAA at the hearings it conducted would be binding on UNLV. By becoming a member of the NCAA, UNLV did more than merely "promise to cooperate in the NCAA enforcement proceedings." *Ante*, at 196. It agreed, as the university hearing officer appointed to rule on Tarkanian's suspension expressly found, to accept the NCAA's "findings of fact as in some way superior to [its] own." App. 74. By the terms of UNLV's membership in the NCAA, the NCAA's findings were final and not subject to further review by any other body, *id.*, at 101, and it was for that reason that UNLV suspended Tarkanian, despite concluding that many of those findings were wrong, *id.*, at 76.

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[1]The NCAA's petition for certiorari challenged the Nevada Supreme Court's holding that the procedures here violated procedural due process. Our grant of the petition, however, was limited solely to the state-action question. I therefore take as a given, although I do not decide, that the hearings provided to Tarkanian were constitutionally inadequate.

In short, it was the NCAA's findings that Tarkanian had violated NCAA rules, made at NCAA-conducted hearings, all of which were agreed to by UNLV in its membership agreement with the NCAA, that resulted in Tarkanian's suspension by UNLV. On these facts, the NCAA was "jointly engaged with [UNLV] officials in the challenged action," and therefore was a state actor.[2] See *Dennis, supra*, at 27–28.

The majority's objections to finding state action in this case were implicitly rejected by our decision in *Dennis*. Initially, the majority relies on the fact that the NCAA did not have any power to take action directly against Tarkanian as indicating that the NCAA was not a state actor. *Ante*, at 195–196. But the same was true in *Dennis:* the private parties did not have any power to issue an injunction against the plaintiff. Only the trial judge, using his authority granted under state law, could impose the injunction.

Next, the majority points out that UNLV was free to withdraw from the NCAA at any time. *Ante*, at 194–195. Indeed, it is true that when considering UNLV's options, the university hearing officer noted that one of those options was to "[p]ull out of the NCAA completely." App. 76. But of course the trial judge in *Dennis* could have withdrawn from his agreement at any time as well. That he had that option is simply irrelevant to finding that he had entered into an

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[2] The Court notes that the United States Courts of Appeals have, since our decisions in *Rendell-Baker* v. *Kohn*, 457 U. S. 830 (1982), *Lugar* v. *Edmondson Oil Co.*, 457 U. S. 922 (1982), and *Blum* v. *Yaretsky*, 457 U. S. 991 (1982), held unanimously that the NCAA is not a state actor. *Ante*, at 182, n. 5. See *McCormack* v. *NCAA*, 845 F. 2d 1338, 1346 (CA5 1988); *Karmanos* v. *Baker*, 816 F. 2d 258, 261 (CA6 1987); *Graham* v. *NCAA*, 804 F. 2d 953, 958 (CA6 1986); *Arlosoroff* v. *NCAA*, 746 F. 2d 1019, 1021–1022 (CA4 1984). In none of those cases, however, did the courts address the theory before us here. *E. g., McCormack, supra*, at 1346. Indeed, in *Arlosoroff*, on which the subsequent decisions principally rely, the plaintiff was challenging the actions of Duke, a private university. The issue of joint action between the NCAA and a public university would never have arisen in that case.

agreement. What mattered was not that he could have withdrawn, but rather that he did not do so.

Finally, the majority relies extensively on the fact that the NCAA and UNLV were adversaries throughout the proceedings before the NCAA. *Ante*, at 196. The majority provides a detailed description of UNLV's attempts to avoid the imposition of sanctions by the NCAA. But this opportunity for opposition, provided for by the terms of the membership agreement between UNLV and the NCAA, does not undercut the agreement itself. Surely our decision in *Dennis* would not have been different had the private parties permitted the trial judge to seek to persuade them that he should not grant the injunction before finally holding the judge to his agreement with them to do so. The key there, as with any conspiracy, is that ultimately the parties agreed to take the action.

The majority states in conclusion that "[i]t would be ironic indeed to conclude that the NCAA's imposition of sanctions against UNLV—sanctions that UNLV and its counsel, including the Attorney General of Nevada, steadfastly opposed during protracted adversary proceedings—is fairly attributable to the State of Nevada." *Ante*, at 199. I agree. Had UNLV refused to suspend Tarkanian, and the NCAA responded by imposing sanctions against UNLV, it would be hard indeed to find any state action that harmed Tarkanian. But that is not this case. Here, UNLV did suspend Tarkanian, and it did so because it embraced the NCAA rules governing conduct of its athletic program and adopted the results of the hearings conducted by the NCAA concerning Tarkanian, as it had agreed that it would. Under these facts, I would find that the NCAA acted jointly with UNLV and therefore is a state actor.[3]

I respectfully dissent.

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[3] The NCAA does not argue that, if it is found to be a state actor, the injunction entered against it by the trial court is invalid. Tr. of Oral Arg. 49. I therefore express no opinion on that question.

Syllabus

# VIRGINIA *v.* BLACK ET AL.

## CERTIORARI TO THE SUPREME COURT OF VIRGINIA

No. 01–1107. Argued December 11, 2002—Decided April 7, 2003

Respondents were convicted separately of violating a Virginia statute that makes it a felony "for any person . . . , with the intent of intimidating any person or group . . . , to burn . . . a cross on the property of another, a highway or other public place," and specifies that "[a]ny such burning . . . shall be prima facie evidence of an intent to intimidate a person or group." When respondent Black objected on First Amendment grounds to his trial court's jury instruction that cross burning by itself is sufficient evidence from which the required "intent to intimidate" could be inferred, the prosecutor responded that the instruction was taken straight out of the Virginia Model Instructions. Respondent O'Mara pleaded guilty to charges of violating the statute, but reserved the right to challenge its constitutionality. At respondent Elliott's trial, the judge instructed the jury as to what the Commonwealth had to prove, but did not give an instruction on the meaning of the word "intimidate," nor on the statute's prima facie evidence provision. Consolidating all three cases, the Virginia Supreme Court held that the cross-burning statute is unconstitutional on its face; that it is analytically indistinguishable from the ordinance found unconstitutional in *R. A. V.* v. *St. Paul*, 505 U. S. 377; that it discriminates on the basis of content and viewpoint since it selectively chooses only cross burning because of its distinctive message; and that the prima facie evidence provision renders the statute overbroad because the enhanced probability of prosecution under the statute chills the expression of protected speech.

*Held:* The judgment is affirmed in part, vacated in part, and remanded.

262 Va. 764, 553 S. E. 2d 738, affirmed in part, vacated in part, and remanded.

JUSTICE O'CONNOR delivered the opinion of the Court with respect to Parts I, II, and III, concluding that a State, consistent with the First Amendment, may ban cross burning carried out with the intent to intimidate. Pp. 352–363.

(a) Burning a cross in the United States is inextricably intertwined with the history of the Ku Klux Klan, which, following its formation in 1866, imposed a reign of terror throughout the South, whipping, threatening, and murdering blacks, southern whites who disagreed with the Klan, and "carpetbagger" northern whites. The Klan has often used cross burnings as a tool of intimidation and a threat of impending vio-

lence, although such burnings have also remained potent symbols of shared group identity and ideology, serving as a central feature of Klan gatherings. To this day, however, regardless of whether the message is a political one or is also meant to intimidate, the burning of a cross is a "symbol of hate." *Capitol Square Review and Advisory Bd.* v. *Pinette*, 515 U. S. 753, 771. While cross burning does not inevitably convey a message of intimidation, often the cross burner intends that the recipients of the message fear for their lives. And when a cross burning is used to intimidate, few if any messages are more powerful. Pp. 352–357.

(b) The protections the First Amendment affords speech and expressive conduct are not absolute. This Court has long recognized that the government may regulate certain categories of expression consistent with the Constitution. See, *e. g.*, *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571–572. For example, the First Amendment permits a State to ban "true threats," *e. g.*, *Watts* v. *United States*, 394 U. S. 705, 708 *(per curiam)*, which encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals, see, *e. g.*, *ibid.* The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protects individuals from the fear of violence and the disruption that fear engenders, as well as from the possibility that the threatened violence will occur. *R. A. V.*, *supra*, at 388. Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death. Respondents do not contest that some cross burnings fit within this meaning of intimidating speech, and rightly so. As the history of cross burning in this country shows, that act is often intimidating, intended to create a pervasive fear in victims that they are a target of violence. Pp. 358–360.

(c) The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages in light of cross burning's long and pernicious history as a signal of impending violence. A ban on cross burning carried out with the intent to intimidate is fully consistent with this Court's holding in *R. A. V.* Contrary to the Virginia Supreme Court's ruling, *R. A. V.* did not hold that the First Amendment prohibits *all* forms of content-based discrimination within a proscribable area of speech. Rather, the Court specifically stated that a particular type of content discrimination does not violate the First Amendment when the basis for it consists

entirely of the very reason its entire class of speech is proscribable. 505 U. S., at 388. For example, it is permissible to prohibit only that obscenity that is most patently offensive in its prurience—*i. e.*, that which involves the most lascivious displays of sexual activity. *Ibid.* Similarly, Virginia's statute does not run afoul of the First Amendment insofar as it bans cross burning with intent to intimidate. Unlike the statute at issue in *R. A. V.*, the Virginia statute does not single out for opprobrium only that speech directed toward "one of the specified disfavored topics." *Id.*, at 391. It does not matter whether an individual burns a cross with intent to intimidate because of the victim's race, gender, or religion, or because of the victim's "political affiliation, union membership, or homosexuality." *Ibid.* Thus, just as a State may regulate only that obscenity which is the most obscene due to its prurient content, so too may a State choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm. Pp. 360–363.

JUSTICE O'CONNOR, joined by THE CHIEF JUSTICE, JUSTICE STEVENS, and JUSTICE BREYER, concluded in Parts IV and V that the Virginia statute's prima facie evidence provision, as interpreted through the jury instruction given in respondent Black's case and as applied therein, is unconstitutional on its face. Because the instruction is the same as the Commonwealth's Model Jury Instruction, and because the Virginia Supreme Court had the opportunity to expressly disavow it, the instruction's construction of the prima facie provision is as binding on this Court as if its precise words had been written into the statute. *E. g., Terminiello* v. *Chicago*, 337 U. S. 1, 4. As construed by the instruction, the prima facie provision strips away the very reason why a State may ban cross burning with the intent to intimidate. The provision permits a jury to convict in every cross burning case in which defendants exercise their constitutional right not to put on a defense. And even where a defendant like Black presents a defense, the provision makes it more likely that the jury will find an intent to intimidate regardless of the particular facts of the case. It permits the Commonwealth to arrest, prosecute, and convict a person based solely on the fact of cross burning itself. As so interpreted, it would create an unacceptable risk of the suppression of ideas. *E. g., Secretary of State of Md.* v. *Joseph H. Munson Co.*, 467 U. S. 947, 965, n. 13. The act of burning a cross may mean that a person is engaging in constitutionally proscribable intimidation, or it may mean only that the person is engaged in core political speech. The prima facie evidence provision blurs the line between these meanings, ignoring all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate. The First Amendment does not permit such a shortcut. Thus, Black's conviction cannot stand, and the judgment as

to him is affirmed. Conversely, Elliott's jury did not receive any instruction on the prima facie provision, and the provision was not an issue in O'Mara's case because he pleaded guilty. The possibility that the provision is severable, and if so, whether Elliott and O'Mara could be retried under the statute, is left open. Also left open is the theoretical possibility that, on remand, the Virginia Supreme Court could interpret the prima facie provision in a manner that would avoid the constitutional objections described above. Pp. 363–368.

JUSTICE SCALIA agreed that this Court should vacate and remand the judgment of the Virginia Supreme Court with respect to respondents Elliott and O'Mara so that that court can have an opportunity authoritatively to construe the cross-burning statute's prima-facie-evidence provision. Pp. 368, 379.

JUSTICE SOUTER, joined by JUSTICE KENNEDY and JUSTICE GINSBURG, concluded that the Virginia statute is unconstitutional and cannot be saved by any exception under *R. A. V.* v. *St. Paul*, 505 U. S. 377, and therefore concurred in the Court's judgment insofar as it affirms the invalidation of respondent Black's conviction. Pp. 380–381, 387.

O'CONNOR, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III, in which REHNQUIST, C. J., and STEVENS, SCALIA, and BREYER, JJ., joined, and an opinion with respect to Parts IV and V, in which REHNQUIST, C. J., and STEVENS and BREYER, JJ., joined. STEVENS, J., filed a concurring opinion, *post*, p. 368. SCALIA, J., filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part, in which THOMAS, J., joined as to Parts I and II, *post*, p. 368. SOUTER, J., filed an opinion concurring in the judgment in part and dissenting in part, in which KENNEDY and GINSBURG, JJ., joined, *post*, p. 380. THOMAS, J., filed a dissenting opinion, *post*, p. 388.

*William H. Hurd*, State Solicitor of Virginia, argued the cause for petitioner. With him on the brief were *Jerry W. Kilgore*, Attorney General, *Maureen Riley Matsen* and *William E. Thro*, Deputy State Solicitors, and *Alison P. Landry*, Assistant Attorney General.

*Deputy Solicitor General Dreeben* argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Olson*, *Assistant Attorney General Boyd*, *Barbara McDowell*, *Jessica Dunsay Silver*, and *Linda F. Thome*.

*Rodney A. Smolla* argued the cause for respondents. With him on the brief were *James O. Broccoletti*, *David P. Baugh*, and *Kevin E. Martingayle.**

JUSTICE O'CONNOR announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III, and an opinion with respect to Parts IV and V, in which THE CHIEF JUSTICE, JUSTICE STEVENS, and JUSTICE BREYER join.

In this case we consider whether the Commonwealth of Virginia's statute banning cross burning with "an intent to intimidate a person or group of persons" violates the First Amendment. Va. Code Ann. §18.2–423 (1996). We conclude that while a State, consistent with the First Amendment, may ban cross burning carried out with the intent to intimidate, the provision in the Virginia statute treating any

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*Briefs of *amici curiae* urging reversal were filed for the State of California by *Bill Lockyer*, Attorney General, *Manuel M. Medeiros*, State Solicitor General, *Richard M. Frank*, Chief Assistant Attorney General, and *Angela Sierra*, Deputy Attorney General; for the State of New Jersey et al. by *David Samson*, Attorney General of New Jersey, and *Carol Johnston*, Deputy Attorney General, and by the Attorneys General for their respective States as follows: *Janet Napolitano* of Arizona, *Richard Blumenthal* of Connecticut, *Thomas J. Miller* of Iowa, *J. Joseph Curran, Jr.*, of Maryland, *Thomas F. Reilly* of Massachusetts, *Jennifer M. Granholm* of Michigan, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Roy Cooper* of North Carolina, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Mark L. Shurtleff* of Utah, and *William H. Sorrell* of Vermont; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger*.

Briefs of *amici curiae* urging affirmance were filed for the Council of Conservative Citizens by *Edgar J. Steele;* for the Rutherford Institute by *John W. Whitehead* and *Steven H. Aden;* and for the Thomas Jefferson Center for the Protection of Free Expression by *Robert M. O'Neil* and *J. Joshua Wheeler*.

*Martin E. Karlinsky, Howard W. Goldstein, Steven M. Freeman, Frederick M. Lawrence,* and *Elliot M. Mincberg* filed a brief for the Anti-Defamation League et al. as *amici curiae*.

cross burning as prima facie evidence of intent to intimidate renders the statute unconstitutional in its current form.

## I

Respondents Barry Black, Richard Elliott, and Jonathan O'Mara were convicted separately of violating Virginia's cross-burning statute, § 18.2–423. That statute provides:

> "It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony.
>
> "Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons."

On August 22, 1998, Barry Black led a Ku Klux Klan rally in Carroll County, Virginia. Twenty-five to thirty people attended this gathering, which occurred on private property with the permission of the owner, who was in attendance. The property was located on an open field just off Brushy Fork Road (State Highway 690) in Cana, Virginia.

When the sheriff of Carroll County learned that a Klan rally was occurring in his county, he went to observe it from the side of the road. During the approximately one hour that the sheriff was present, about 40 to 50 cars passed the site, a "few" of which stopped to ask the sheriff what was happening on the property. App. 71. Eight to ten houses were located in the vicinity of the rally. Rebecca Sechrist, who was related to the owner of the property where the rally took place, "sat and watched to see wha[t] [was] going on" from the lawn of her in-laws' house. She looked on as the Klan prepared for the gathering and subsequently conducted the rally itself. *Id.*, at 103.

During the rally, Sechrist heard Klan members speak about "what they were" and "what they believed in." *Id.*,

at 106. The speakers "talked real bad about the blacks and the Mexicans." *Id.*, at 109. One speaker told the assembled gathering that "he would love to take a .30/.30 and just random[ly] shoot the blacks." *Ibid.* The speakers also talked about "President Clinton and Hillary Clinton," and about how their tax money "goes to . . . the black people." *Ibid.* Sechrist testified that this language made her "very . . . scared." *Id.*, at 110.

At the conclusion of the rally, the crowd circled around a 25- to 30-foot cross. The cross was between 300 and 350 yards away from the road. According to the sheriff, the cross "then all of a sudden . . . went up in a flame." *Id.*, at 71. As the cross burned, the Klan played Amazing Grace over the loudspeakers. Sechrist stated that the cross burning made her feel "awful" and "terrible." *Id.*, at 110.

When the sheriff observed the cross burning, he informed his deputy that they needed to "find out who's responsible and explain to them that they cannot do this in the State of Virginia." *Id.*, at 72. The sheriff then went down the driveway, entered the rally, and asked "who was responsible for burning the cross." *Id.*, at 74. Black responded, "I guess I am because I'm the head of the rally." *Ibid.* The sheriff then told Black, "[T]here's a law in the State of Virginia that you cannot burn a cross and I'll have to place you under arrest for this." *Ibid.*

Black was charged with burning a cross with the intent of intimidating a person or group of persons, in violation of § 18.2–423. At his trial, the jury was instructed that "intent to intimidate means the motivation to intentionally put a person or a group of persons in fear of bodily harm. Such fear must arise from the willful conduct of the accused rather than from some mere temperamental timidity of the victim." *Id.*, at 146. The trial court also instructed the jury that "the burning of a cross by itself is sufficient evidence from which you may infer the required intent." *Ibid.* When Black objected to this last instruction on First Amendment grounds,

the prosecutor responded that the instruction was "taken straight out of the [Virginia] Model Instructions." *Id.*, at 134. The jury found Black guilty, and fined him $2,500. The Court of Appeals of Virginia affirmed Black's conviction. Rec. No. 1581–99–3 (Va. App., Dec. 19, 2000), App. 201.

On May 2, 1998, respondents Richard Elliott and Jonathan O'Mara, as well as a third individual, attempted to burn a cross on the yard of James Jubilee. Jubilee, an African-American, was Elliott's next-door neighbor in Virginia Beach, Virginia. Four months prior to the incident, Jubilee and his family had moved from California to Virginia Beach. Before the cross burning, Jubilee spoke to Elliott's mother to inquire about shots being fired from behind the Elliott home. Elliott's mother explained to Jubilee that her son shot firearms as a hobby, and that he used the backyard as a firing range.

On the night of May 2, respondents drove a truck onto Jubilee's property, planted a cross, and set it on fire. Their apparent motive was to "get back" at Jubilee for complaining about the shooting in the backyard. *Id.*, at 241. Respondents were not affiliated with the Klan. The next morning, as Jubilee was pulling his car out of the driveway, he noticed the partially burned cross approximately 20 feet from his house. After seeing the cross, Jubilee was "very nervous" because he "didn't know what would be the next phase," and because "a cross burned in your yard . . . tells you that it's just the first round." *Id.*, at 231.

Elliott and O'Mara were charged with attempted cross burning and conspiracy to commit cross burning. O'Mara pleaded guilty to both counts, reserving the right to challenge the constitutionality of the cross-burning statute. The judge sentenced O'Mara to 90 days in jail and fined him $2,500. The judge also suspended 45 days of the sentence and $1,000 of the fine.

At Elliott's trial, the judge originally ruled that the jury would be instructed "that the burning of a cross by itself is

sufficient evidence from which you may infer the required intent." *Id.*, at 221–222. At trial, however, the court instructed the jury that the Commonwealth must prove that "the defendant intended to commit cross burning," that "the defendant did a direct act toward the commission of the cross burning," and that "the defendant had the intent of intimidating any person or group of persons." *Id.*, at 250. The court did not instruct the jury on the meaning of the word "intimidate," nor on the prima facie evidence provision of § 18.2–423. The jury found Elliott guilty of attempted cross burning and acquitted him of conspiracy to commit cross burning. It sentenced Elliott to 90 days in jail and a $2,500 fine. The Court of Appeals of Virginia affirmed the convictions of both Elliott and O'Mara. *O'Mara* v. *Commonwealth*, 33 Va. App. 525, 535 S. E. 2d 175 (2000).

Each respondent appealed to the Supreme Court of Virginia, arguing that § 18.2–423 is facially unconstitutional. The Supreme Court of Virginia consolidated all three cases, and held that the statute is unconstitutional on its face. 262 Va. 764, 553 S. E. 2d 738 (2001). It held that the Virginia cross-burning statute "is analytically indistinguishable from the ordinance found unconstitutional in *R. A. V.* [v. *St. Paul*, 505 U. S. 377 (1992)]." *Id.*, at 772, 553 S. E. 2d, at 742. The Virginia statute, the court held, discriminates on the basis of content since it "selectively chooses only cross burning because of its distinctive message." *Id.*, at 774, 553 S. E. 2d, at 744. The court also held that the prima facie evidence provision renders the statute overbroad because "[t]he enhanced probability of prosecution under the statute chills the expression of protected speech." *Id.*, at 777, 553 S. E. 2d, at 746.

Three justices dissented, concluding that the Virginia cross-burning statute passes constitutional muster because it proscribes only conduct that constitutes a true threat. The justices noted that unlike the ordinance found unconstitutional in *R. A. V.* v. *St. Paul*, 505 U. S. 377 (1992), the Virginia

statute does not just target cross burning "on the basis of race, color, creed, religion or gender." 262 Va., at 791, 553 S. E. 2d, at 753. Rather, "the Virginia statute applies to any individual who burns a cross for any reason provided the cross is burned with the intent to intimidate." *Ibid.* The dissenters also disagreed with the majority's analysis of the prima facie provision because the inference alone "is clearly insufficient to establish beyond a reasonable doubt that a defendant burned a cross with the intent to intimidate." *Id.*, at 795, 553 S. E. 2d, at 756. The dissent noted that the burden of proof still remains on the Commonwealth to prove intent to intimidate. We granted certiorari. 535 U. S. 1094 (2002).[1]

## II

Cross burning originated in the 14th century as a means for Scottish tribes to signal each other. See M. Newton & J. Newton, The Ku Klux Klan: An Encyclopedia 145 (1991). Sir Walter Scott used cross burnings for dramatic effect in The Lady of the Lake, where the burning cross signified both a summons and a call to arms. See W. Scott, The Lady of The Lake, canto third. Cross burning in this country, however, long ago became unmoored from its Scottish ancestry. Burning a cross in the United States is inextricably intertwined with the history of the Ku Klux Klan.

The first Ku Klux Klan began in Pulaski, Tennessee, in the spring of 1866. Although the Ku Klux Klan started as a social club, it soon changed into something far different. The Klan fought Reconstruction and the corresponding drive to allow freed blacks to participate in the political process.

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[1] After we granted certiorari, the Commonwealth enacted another statute designed to remedy the constitutional problems identified by the state court. See Va. Code Ann. § 18.2–423.01 (2002). Section 18.2–423.01 bans the burning of "an object" when done "with the intent of intimidating any person or group of persons." The statute does not contain any prima facie evidence provision. Section 18.2–423.01, however, did not repeal § 18.2–423, the cross-burning statute at issue in this case.

Soon the Klan imposed "a veritable reign of terror" throughout the South. S. Kennedy, Southern Exposure 31 (1991) (hereinafter Kennedy). The Klan employed tactics such as whipping, threatening to burn people at the stake, and murder. W. Wade, The Fiery Cross: The Ku Klux Klan in America 48–49 (1987) (hereinafter Wade). The Klan's victims included blacks, southern whites who disagreed with the Klan, and "carpetbagger" northern whites.

The activities of the Ku Klux Klan prompted legislative action at the national level. In 1871, "President Grant sent a message to Congress indicating that the Klan's reign of terror in the Southern States had rendered life and property insecure." *Jett* v. *Dallas Independent School Dist.*, 491 U. S. 701, 722 (1989) (internal quotation marks and alterations omitted). In response, Congress passed what is now known as the Ku Klux Klan Act. See "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes," 17 Stat. 13 (now codified at 42 U. S. C. §§ 1983, 1985, and 1986). President Grant used these new powers to suppress the Klan in South Carolina, the effect of which severely curtailed the Klan in other States as well. By the end of Reconstruction in 1877, the first Klan no longer existed.

The genesis of the second Klan began in 1905, with the publication of Thomas Dixon's The Clansmen: An Historical Romance of the Ku Klux Klan. Dixon's book was a sympathetic portrait of the first Klan, depicting the Klan as a group of heroes "saving" the South from blacks and the "horrors" of Reconstruction. Although the first Klan never actually practiced cross burning, Dixon's book depicted the Klan burning crosses to celebrate the execution of former slaves. *Id.*, at 324–326; see also *Capitol Square Review and Advisory Bd.* v. *Pinette*, 515 U. S. 753, 770–771 (1995) (THOMAS, J., concurring). Cross burning thereby became associated with the first Ku Klux Klan. When D. W. Griffith turned Dixon's book into the movie The Birth of a Nation in 1915,

the association between cross burning and the Klan became indelible. In addition to the cross burnings in the movie, a poster advertising the film displayed a hooded Klansman riding a hooded horse, with his left hand holding the reins of the horse and his right hand holding a burning cross above his head. Wade 127. Soon thereafter, in November 1915, the second Klan began.

From the inception of the second Klan, cross burnings have been used to communicate both threats of violence and messages of shared ideology. The first initiation ceremony occurred on Stone Mountain near Atlanta, Georgia. While a 40-foot cross burned on the mountain, the Klan members took their oaths of loyalty. See Kennedy 163. This cross burning was the second recorded instance in the United States. The first known cross burning in the country had occurred a little over one month before the Klan initiation, when a Georgia mob celebrated the lynching of Leo Frank by burning a "gigantic cross" on Stone Mountain that was "visible throughout" Atlanta. Wade 144 (internal quotation marks omitted).

The new Klan's ideology did not differ much from that of the first Klan. As one Klan publication emphasized, "We avow the distinction between [the] races, . . . and we shall ever be true to the faithful maintenance of White Supremacy and will strenuously oppose any compromise thereof in any and all things." *Id.*, at 147–148 (internal quotation marks omitted). Violence was also an elemental part of this new Klan. By September 1921, the New York World newspaper documented 152 acts of Klan violence, including 4 murders, 41 floggings, and 27 tar-and-featherings. Wade 160.

Often, the Klan used cross burnings as a tool of intimidation and a threat of impending violence. For example, in 1939 and 1940, the Klan burned crosses in front of synagogues and churches. See Kennedy 175. After one cross burning at a synagogue, a Klan member noted that if the cross burning did not "shut the Jews up, we'll cut a few

throats and see what happens." *Ibid.* (internal quotation marks omitted). In Miami in 1941, the Klan burned four crosses in front of a proposed housing project, declaring, "We are here to keep niggers out of your town . . . . When the law fails you, call on us." *Id.*, at 176 (internal quotation marks omitted). And in Alabama in 1942, in "a whirlwind climax to weeks of flogging and terror," the Klan burned crosses in front of a union hall and in front of a union leader's home on the eve of a labor election. *Id.*, at 180. These cross burnings embodied threats to people whom the Klan deemed antithetical to its goals. And these threats had special force given the long history of Klan violence.

The Klan continued to use cross burnings to intimidate after World War II. In one incident, an African-American "school teacher who recently moved his family into a block formerly occupied only by whites asked the protection of city police . . . after the burning of a cross in his front yard." Richmond News Leader, Jan. 21, 1949, p. 19, App. 312. And after a cross burning in Suffolk, Virginia, during the late 1940's, the Virginia Governor stated that he would "not allow any of our people of any race to be subjected to terrorism or intimidation in any form by the Klan or any other organization." D. Chalmers, Hooded Americanism: The History of the Ku Klux Klan 333 (1980) (hereinafter Chalmers). These incidents of cross burning, among others, helped prompt Virginia to enact its first version of the cross-burning statute in 1950.

The decision of this Court in *Brown* v. *Board of Education*, 347 U. S. 483 (1954), along with the civil rights movement of the 1950's and 1960's, sparked another outbreak of Klan violence. These acts of violence included bombings, beatings, shootings, stabbings, and mutilations. See, *e. g.*, Chalmers 349–350; Wade 302–303. Members of the Klan burned crosses on the lawns of those associated with the civil rights movement, assaulted the Freedom Riders, bombed churches, and murdered blacks as well as whites

whom the Klan viewed as sympathetic toward the civil rights movement.

Throughout the history of the Klan, cross burnings have also remained potent symbols of shared group identity and ideology. The burning cross became a symbol of the Klan itself and a central feature of Klan gatherings. According to the Klan constitution (called the kloran), the "fiery cross" was the "emblem of that sincere, unselfish devotedness of all klansmen to the sacred purpose and principles we have espoused." The Ku Klux Klan Hearings before the House Committee on Rules, 67th Cong., 1st Sess., 114, Exh. G (1921); see also Wade 419. And the Klan has often published its newsletters and magazines under the name The Fiery Cross. See *id.*, at 226, 489.

At Klan gatherings across the country, cross burning became the climax of the rally or the initiation. Posters advertising an upcoming Klan rally often featured a Klan member holding a cross. See N. MacLean, Behind the Mask of Chivalry: The Making of the Second Ku Klux Klan 142–143 (1994). Typically, a cross burning would start with a prayer by the "Klavern" minister, followed by the singing of Onward Christian Soldiers. The Klan would then light the cross on fire, as the members raised their left arm toward the burning cross and sang The Old Rugged Cross. Wade 185. Throughout the Klan's history, the Klan continued to use the burning cross in their ritual ceremonies.

For its own members, the cross was a sign of celebration and ceremony. During a joint Nazi-Klan rally in 1940, the proceeding concluded with the wedding of two Klan members who "were married in full Klan regalia beneath a blazing cross." *Id.*, at 271. In response to antimasking bills introduced in state legislatures after World War II, the Klan burned crosses in protest. See Chalmers 340. On March 26, 1960, the Klan engaged in rallies and cross burnings throughout the South in an attempt to recruit 10 million members. See Wade 305. Later in 1960, the Klan became

an issue in the third debate between Richard Nixon and John Kennedy, with both candidates renouncing the Klan. After this debate, the Klan reiterated its support for Nixon by burning crosses. See *id.*, at 309. And cross burnings featured prominently in Klan rallies when the Klan attempted to move toward more nonviolent tactics to stop integration. See *id.*, at 323; cf. Chalmers 368–369, 371–372, 380, 384. In short, a burning cross has remained a symbol of Klan ideology and of Klan unity.

To this day, regardless of whether the message is a political one or whether the message is also meant to intimidate, the burning of a cross is a "symbol of hate." *Capitol Square Review and Advisory Bd.* v. *Pinette*, 515 U. S., at 771 (THOMAS, J., concurring). And while cross burning sometimes carries no intimidating message, at other times the intimidating message is the *only* message conveyed. For example, when a cross burning is directed at a particular person not affiliated with the Klan, the burning cross often serves as a message of intimidation, designed to inspire in the victim a fear of bodily harm. Moreover, the history of violence associated with the Klan shows that the possibility of injury or death is not just hypothetical. The person who burns a cross directed at a particular person often is making a serious threat, meant to coerce the victim to comply with the Klan's wishes unless the victim is willing to risk the wrath of the Klan. Indeed, as the cases of respondents Elliott and O'Mara indicate, individuals without Klan affiliation who wish to threaten or menace another person sometimes use cross burning because of this association between a burning cross and violence.

In sum, while a burning cross does not inevitably convey a message of intimidation, often the cross burner intends that the recipients of the message fear for their lives. And when a cross burning is used to intimidate, few if any messages are more powerful.

## III

### A

The First Amendment, applicable to the States through the Fourteenth Amendment, provides that "Congress shall make no law . . . abridging the freedom of speech." The hallmark of the protection of free speech is to allow "free trade in ideas"—even ideas that the overwhelming majority of people might find distasteful or discomforting. *Abrams* v. *United States*, 250 U. S. 616, 630 (1919) (Holmes, J., dissenting); see also *Texas* v. *Johnson*, 491 U. S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"). Thus, the First Amendment "ordinarily" denies a State "the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence." *Whitney* v. *California*, 274 U. S. 357, 374 (1927) (Brandeis, J., concurring). The First Amendment affords protection to symbolic or expressive conduct as well as to actual speech. See, *e. g.*, *R. A. V.* v. *City of St. Paul*, 505 U. S., at 382; *Texas* v. *Johnson*, *supra*, at 405–406; *United States* v. *O'Brien*, 391 U. S. 367, 376–377 (1968); *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503, 505 (1969).

The protections afforded by the First Amendment, however, are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the Constitution. See, *e. g.*, *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571–572 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem"). The First Amendment permits "restrictions upon the content of speech in a few limited areas, which are 'of such slight social value

as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' " *R. A. V.* v. *City of St. Paul*, *supra*, at 382–383 (quoting *Chaplinsky* v. *New Hampshire*, *supra*, at 572).

Thus, for example, a State may punish those words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky* v. *New Hampshire*, *supra*, at 572; see also *R. A. V.* v. *City of St. Paul*, *supra*, at 383 (listing limited areas where the First Amendment permits restrictions on the content of speech). We have consequently held that fighting words—"those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction"—are generally proscribable under the First Amendment. *Cohen* v. *California*, 403 U. S. 15, 20 (1971); see also *Chaplinsky* v. *New Hampshire*, *supra*, at 572. Furthermore, "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg* v. *Ohio*, 395 U. S. 444, 447 (1969) *(per curiam)*. And the First Amendment also permits a State to ban a "true threat." *Watts* v. *United States*, 394 U. S. 705, 708 (1969) *(per curiam)* (internal quotation marks omitted); accord, *R. A. V.* v. *City of St. Paul*, *supra*, at 388 ("[T]hreats of violence are outside the First Amendment"); *Madsen* v. *Women's Health Center, Inc.*, 512 U. S. 753, 774 (1994); *Schenck* v. *Pro-Choice Network of Western N. Y.*, 519 U. S. 357, 373 (1997).

"True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. See *Watts* v. *United States*, *supra*, at 708 ("political hyberbole" is not a true threat); *R. A. V.* v. *City of St. Paul*, 505 U. S., at 388. The

speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats "protect[s] individuals from the fear of violence" and "from the disruption that fear engenders," in addition to protecting people "from the possibility that the threatened violence will occur." *Ibid.* Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death. Respondents do not contest that some cross burnings fit within this meaning of intimidating speech, and rightly so. As noted in Part II, *supra*, the history of cross burning in this country shows that cross burning is often intimidating, intended to create a pervasive fear in victims that they are a target of violence.

B

The Supreme Court of Virginia ruled that in light of *R. A. V.* v. *City of St. Paul*, *supra*, even if it is constitutional to ban cross burning in a content-neutral manner, the Virginia cross-burning statute is unconstitutional because it discriminates on the basis of content and viewpoint. 262 Va., at 771–776, 553 S. E. 2d, at 742–745. It is true, as the Supreme Court of Virginia held, that the burning of a cross is symbolic expression. The reason why the Klan burns a cross at its rallies, or individuals place a burning cross on someone else's lawn, is that the burning cross represents the message that the speaker wishes to communicate. Individuals burn crosses as opposed to other means of communication because cross burning carries a message in an effective and dramatic manner.[2]

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[2] JUSTICE THOMAS argues in dissent that cross burning is "conduct, not expression." *Post*, at 394. While it is of course true that burning a cross is conduct, it is equally true that the First Amendment protects symbolic conduct as well as pure speech. See *supra*, at 358. As JUSTICE THOMAS has previously recognized, a burning cross is a "symbol of hate," and a

The fact that cross burning is symbolic expression, however, does not resolve the constitutional question. The Supreme Court of Virginia relied upon *R. A. V.* v. *City of St. Paul*, *supra*, to conclude that once a statute discriminates on the basis of this type of content, the law is unconstitutional. We disagree.

In *R. A. V.*, we held that a local ordinance that banned certain symbolic conduct, including cross burning, when done with the knowledge that such conduct would " 'arouse anger, alarm or resentment in others on the basis of race, color, creed, religion or gender' " was unconstitutional. *Id.*, at 380 (quoting the St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn., Legis. Code § 292.02 (1990)). We held that the ordinance did not pass constitutional muster because it discriminated on the basis of content by targeting only those individuals who "provoke violence" on a basis specified in the law. 505 U. S., at 391. The ordinance did not cover "[t]hose who wish to use 'fighting words' in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality." *Ibid.* This content-based discrimination was unconstitutional because it allowed the city "to impose special prohibitions on those speakers who express views on disfavored subjects." *Ibid.*

We did not hold in *R. A. V.* that the First Amendment prohibits *all* forms of content-based discrimination within a proscribable area of speech. Rather, we specifically stated that some types of content discrimination did not violate the First Amendment:

> "When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or

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"a symbol of white supremacy." *Capitol Square Review and Advisory Bd.* v. *Pinette*, 515 U. S. 753, 770–771 (1995) (concurring opinion).

> viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class." *Id.*, at 388.

Indeed, we noted that it would be constitutional to ban only a particular type of threat: "[T]he Federal Government can criminalize only those threats of violence that are directed against the President . . . since the reasons why threats of violence are outside the First Amendment . . . have special force when applied to the person of the President." *Ibid.* And a State may "choose to prohibit only that obscenity which is the most patently offensive *in its prurience—i. e.*, that which involves the most lascivious displays of sexual activity." *Ibid.* (emphasis in original). Consequently, while the holding of *R. A. V.* does not permit a State to ban only obscenity based on "offensive *political* messages," *ibid.*, or "only those threats against the President that mention his policy on aid to inner cities," *ibid.*, the First Amendment permits content discrimination "based on the very reasons why the particular class of speech at issue . . . is proscribable," *id.*, at 393.

Similarly, Virginia's statute does not run afoul of the First Amendment insofar as it bans cross burning with intent to intimidate. Unlike the statute at issue in *R. A. V.*, the Virginia statute does not single out for opprobrium only that speech directed toward "one of the specified disfavored topics." *Id.*, at 391. It does not matter whether an individual burns a cross with intent to intimidate because of the victim's race, gender, or religion, or because of the victim's "political affiliation, union membership, or homosexuality." *Ibid.* Moreover, as a factual matter it is not true that cross burners direct their intimidating conduct solely to racial or religious minorities. See, *e. g.*, *supra*, at 355 (noting the instances of cross burnings directed at union members); *State* v. *Miller*, 6 Kan. App. 2d 432, 629 P. 2d 748 (1981) (describing

the case of a defendant who burned a cross in the yard of the lawyer who had previously represented him and who was currently prosecuting him). Indeed, in the case of Elliott and O'Mara, it is at least unclear whether the respondents burned a cross due to racial animus. See 262 Va., at 791, 553 S. E. 2d, at 753 (Hassell, J., dissenting) (noting that "these defendants burned a cross because they were angry that their neighbor had complained about the presence of a firearm shooting range in the Elliott's yard, not because of any racial animus").

The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages in light of cross burning's long and pernicious history as a signal of impending violence. Thus, just as a State may regulate only that obscenity which is the most obscene due to its prurient content, so too may a State choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm. A ban on cross burning carried out with the intent to intimidate is fully consistent with our holding in *R. A. V.* and is proscribable under the First Amendment.

## IV

The Supreme Court of Virginia ruled in the alternative that Virginia's cross-burning statute was unconstitutionally overbroad due to its provision stating that "[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons." Va. Code Ann. § 18.2–423 (1996). The Commonwealth added the prima facie provision to the statute in 1968. The court below did not reach whether this provision is severable from the rest of the cross-burning statute under Virginia law. See § 1–17.1 ("The provisions of all statutes are severable unless . . . it is

apparent that two or more statutes or provisions must operate in accord with one another"). In this Court, as in the Supreme Court of Virginia, respondents do not argue that the prima facie evidence provision is unconstitutional as applied to any one of them. Rather, they contend that the provision is unconstitutional on its face.

The Supreme Court of Virginia has not ruled on the meaning of the prima facie evidence provision. It has, however, stated that "the act of burning a cross alone, with no evidence of intent to intimidate, will nonetheless suffice for arrest and prosecution and will insulate the Commonwealth from a motion to strike the evidence at the end of its case-in-chief." 262 Va., at 778, 553 S. E. 2d, at 746. The jury in the case of Richard Elliott did not receive any instruction on the prima facie evidence provision, and the provision was not an issue in the case of Jonathan O'Mara because he pleaded guilty. The court in Barry Black's case, however, instructed the jury that the provision means: "The burning of a cross, by itself, is sufficient evidence from which you may infer the required intent." App. 196. This jury instruction is the same as the Model Jury Instruction in the Commonwealth of Virginia. See Virginia Model Jury Instructions, Criminal, Instruction No. 10.250 (1998 and Supp. 2001).

The prima facie evidence provision, as interpreted by the jury instruction, renders the statute unconstitutional. Because this jury instruction is the Model Jury Instruction, and because the Supreme Court of Virginia had the opportunity to expressly disavow the jury instruction, the jury instruction's construction of the prima facie provision "is a ruling on a question of state law that is as binding on us as though the precise words had been written into" the statute. *E. g.*, *Terminiello* v. *Chicago*, 337 U. S. 1, 4 (1949) (striking down an ambiguous statute on facial grounds based upon the instruction given to the jury); see also *New York* v. *Ferber*, 458 U. S. 747, 768, n. 21 (1982) (noting that *Terminiello* involved a facial challenge to the statute); *Secretary of State*

*of Md.* v. *Joseph H. Munson Co.*, 467 U. S. 947, 965, n. 13 (1984); Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 845–846, n. 8 (1970); Monaghan, Overbreadth, 1981 S. Ct. Rev. 1, 10–12; Blakey & Murray, Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law, 2002 B. Y. U. L. Rev. 829, 883, n. 133. As construed by the jury instruction, the prima facie provision strips away the very reason why a State may ban cross burning with the intent to intimidate. The prima facie evidence provision permits a jury to convict in every cross-burning case in which defendants exercise their constitutional right not to put on a defense. And even where a defendant like Black presents a defense, the prima facie evidence provision makes it more likely that the jury will find an intent to intimidate regardless of the particular facts of the case. The provision permits the Commonwealth to arrest, prosecute, and convict a person based solely on the fact of cross burning itself.

It is apparent that the provision as so interpreted "'would create an unacceptable risk of the suppression of ideas.'" *Secretary of State of Md.* v. *Joseph H. Munson Co.*, *supra*, at 965, n. 13 (quoting *Members of City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 797 (1984)). The act of burning a cross may mean that a person is engaging in constitutionally proscribable intimidation. But that same act may mean only that the person is engaged in core political speech. The prima facie evidence provision in this statute blurs the line between these two meanings of a burning cross. As interpreted by the jury instruction, the provision chills constitutionally protected political speech because of the possibility that the Commonwealth will prosecute—and potentially convict—somebody engaging only in lawful political speech at the core of what the First Amendment is designed to protect.

As the history of cross burning indicates, a burning cross is not always intended to intimidate. Rather, sometimes the cross burning is a statement of ideology, a symbol of group

solidarity. It is a ritual used at Klan gatherings, and it is used to represent the Klan itself. Thus, "[b]urning a cross at a political rally would almost certainly be protected expression." *R. A. V.* v. *St. Paul*, 505 U. S., at 402, n. 4 (White, J., concurring in judgment) (citing *Brandenburg* v. *Ohio*, 395 U. S., at 445). Cf. *National Socialist Party of America* v. *Skokie*, 432 U. S. 43 (1977) *(per curiam)*. Indeed, occasionally a person who burns a cross does not intend to express either a statement of ideology or intimidation. Cross burnings have appeared in movies such as Mississippi Burning, and in plays such as the stage adaptation of Sir Walter Scott's The Lady of the Lake.

The prima facie provision makes no effort to distinguish among these different types of cross burnings. It does not distinguish between a cross burning done with the purpose of creating anger or resentment and a cross burning done with the purpose of threatening or intimidating a victim. It does not distinguish between a cross burning at a public rally or a cross burning on a neighbor's lawn. It does not treat the cross burning directed at an individual differently from the cross burning directed at a group of like-minded believers. It allows a jury to treat a cross burning on the property of another with the owner's acquiescence in the same manner as a cross burning on the property of another without the owner's permission. To this extent I agree with JUSTICE SOUTER that the prima facie evidence provision can "skew jury deliberations toward conviction in cases where the evidence of intent to intimidate is relatively weak and arguably consistent with a solely ideological reason for burning." *Post*, at 385 (opinion concurring in judgment in part and dissenting in part).

It may be true that a cross burning, even at a political rally, arouses a sense of anger or hatred among the vast majority of citizens who see a burning cross. But this sense of anger or hatred is not sufficient to ban all cross burnings. As Gerald Gunther has stated, "The lesson I have drawn

from my childhood in Nazi Germany and my happier adult life in this country is the need to walk the sometimes difficult path of denouncing the bigot's hateful ideas with all my power, yet at the same time challenging any community's attempt to suppress hateful ideas by force of law." Casper, Gerry, 55 Stan. L. Rev. 647, 649 (2002) (internal quotation marks omitted). The prima facie evidence provision in this case ignores all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate. The First Amendment does not permit such a shortcut.

For these reasons, the prima facie evidence provision, as interpreted through the jury instruction and as applied in Barry Black's case, is unconstitutional on its face. We recognize that the Supreme Court of Virginia has not authoritatively interpreted the meaning of the prima facie evidence provision. Unlike Justice Scalia, we refuse to speculate on whether *any* interpretation of the prima facie evidence provision would satisfy the First Amendment. Rather, all we hold is that because of the interpretation of the prima facie evidence provision given by the jury instruction, the provision makes the statute facially invalid at this point. We also recognize the theoretical possibility that the court, on remand, could interpret the provision in a manner different from that so far set forth in order to avoid the constitutional objections we have described. We leave open that possibility. We also leave open the possibility that the provision is severable, and if so, whether Elliott and O'Mara could be retried under § 18.2–423.

## V

With respect to Barry Black, we agree with the Supreme Court of Virginia that his conviction cannot stand, and we affirm the judgment of the Supreme Court of Virginia. With respect to Elliott and O'Mara, we vacate the judgment

of the Supreme Court of Virginia, and remand the case for further proceedings.

*It is so ordered.*

JUSTICE STEVENS, concurring.

Cross burning with "an intent to intimidate," Va. Code Ann. § 18.2–423 (1996), unquestionably qualifies as the kind of threat that is unprotected by the First Amendment. For the reasons stated in the separate opinions that Justice White and I wrote in *R. A. V.* v. *St. Paul*, 505 U. S. 377 (1992), that simple proposition provides a sufficient basis for upholding the basic prohibition in the Virginia statute even though it does not cover other types of threatening expressive conduct. With this observation, I join JUSTICE O'CONNOR's opinion.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins as to Parts I and II, concurring in part, concurring in the judgment in part, and dissenting in part.

I agree with the Court that, under our decision in *R. A. V.* v. *St. Paul*, 505 U. S. 377 (1992), a State may, without infringing the First Amendment, prohibit cross burning carried out with the intent to intimidate. Accordingly, I join Parts I–III of the Court's opinion. I also agree that we should vacate and remand the judgment of the Virginia Supreme Court so that that court can have an opportunity authoritatively to construe the prima-facie-evidence provision of Va. Code Ann. § 18.2–423 (1996). I write separately, however, to describe what I believe to be the correct interpretation of § 18.2–423, and to explain why I believe there is no justification for the plurality's apparent decision to invalidate that provision on its face.

I

Section 18.2–423 provides that the burning of a cross in public view "shall be prima facie evidence of an intent to intimidate." In order to determine whether this component

of the statute violates the Constitution, it is necessary, first, to establish precisely what the presentation of prima facie evidence accomplishes.

Typically, "prima facie evidence" is defined as:

> "Such evidence as, in the judgment of the law, is sufficient to establish a given fact . . . and which if not rebutted or contradicted, will remain sufficient. [Such evidence], if unexplained or uncontradicted, is sufficient to sustain a judgment in favor of the issue which it supports, but [it] may be contradicted by other evidence." Black's Law Dictionary 1190 (6th ed. 1990).

The Virginia Supreme Court has, in prior cases, embraced this canonical understanding of the pivotal statutory language. *E. g.*, *Babbitt* v. *Miller*, 192 Va. 372, 379–380, 64 S. E. 2d 718, 722 (1951) ("*Prima facie* evidence is evidence which on its first appearance is sufficient to raise a presumption of fact or establish the fact in question unless rebutted"). For example, in *Nance* v. *Commonwealth*, 203 Va. 428, 124 S. E. 2d 900 (1962), the Virginia Supreme Court interpreted a law of the Commonwealth that (1) prohibited the possession of certain "burglarious" tools "with intent to commit burglary, robbery, or larceny . . . ," and (2) provided that "[t]he possession of such burglarious tools . . . shall be prima facie evidence of an intent to commit burglary, robbery or larceny." Va. Code Ann. § 18.1–87 (1960). The court explained that the prima-facie-evidence provision "cuts off no defense nor interposes any obstacle to a contest of the facts, and 'relieves neither the court nor the jury of the duty to determine all of the questions of fact from the weight of the whole evidence.' " *Nance* v. *Commonwealth*, 203 Va., at 432, 124 S. E. 2d, at 903–904; see also *ibid.*, 124 S. E. 2d, at 904 (noting that the prima-facie-evidence provision " 'is merely a rule of evidence and not the determination of a fact . . .' ").

The established meaning in Virginia, then, of the term "prima facie evidence" appears to be perfectly orthodox: It

is evidence that suffices, on its own, to establish a particular fact. But it is hornbook law that this is true only to the extent that the evidence goes unrebutted. "Prima facie evidence of a fact is such evidence as, in judgment of law, is sufficient to establish the fact; and, *if not rebutted,* remains sufficient for the purpose." 7B Michie's Jurisprudence of Virginia and West Virginia § 32 (1998) (emphasis added).

To be sure, Virginia is entirely free, if it wishes, to discard the canonical understanding of the term "prima facie evidence." Its courts are also permitted to interpret the phrase in different ways for purposes of different statutes. In this case, however, the Virginia Supreme Court has done nothing of the sort. To the extent that tribunal has spoken to the question of what "prima facie evidence" means for purposes of § 18.2–423, it has not deviated a whit from its prior practice and from the ordinary legal meaning of these words. Rather, its opinion explained that under § 18.2–423, "the act of burning a cross alone, with no evidence of intent to intimidate, will . . . suffice for arrest and prosecution and will insulate the Commonwealth from a motion to strike the evidence at the end of its case-in-chief." 262 Va. 764, 778, 553 S. E. 2d 738, 746 (2001). Put otherwise, where the Commonwealth has demonstrated through its case in chief that the defendant burned a cross in public view, this is sufficient, at least until the defendant has come forward with rebuttal evidence, to create a jury issue with respect to the intent element of the offense.

It is important to note that the Virginia Supreme Court did not suggest (as did the trial court's jury instructions in respondent Black's case, see *infra,* at 377) that a jury may, in light of the prima-facie-evidence provision, ignore any rebuttal evidence that has been presented and, solely on the basis of a showing that the defendant burned a cross, find that he intended to intimidate. Nor, crucially, did that court say that the presentation of prima facie evidence is always sufficient to get a case to a jury, *i. e.*, that a court may never

direct a verdict for a defendant who has been shown to have burned a cross in public view, even if, by the end of trial, the defendant has presented rebuttal evidence. Instead, according to the Virginia Supreme Court, the effect of the prima-facie-evidence provision is far more limited. It suffices to "insulate the Commonwealth from a motion to strike the evidence *at the end of its case-in-chief*," but it does nothing more. 262 Va., at 778, 553 S. E. 2d, at 746 (emphasis added). That is, presentation of evidence that a defendant burned a cross in public view is automatically sufficient, on its own, to support an inference that the defendant intended to intimidate *only until* the defendant comes forward with some evidence in rebuttal.

## II

The question presented, then, is whether, given this understanding of the term "prima facie evidence," the cross-burning statute is constitutional. The Virginia Supreme Court answered that question in the negative. It stated that "§ 18.2–423 sweeps within its ambit for arrest and prosecution, both protected and unprotected speech." *Ibid.* "The enhanced probability of prosecution under the statute chills the expression of protected speech sufficiently to render the statute overbroad." *Id.*, at 777, 553 S. E. 2d, at 746.

This approach toward overbreadth analysis is unprecedented. We have never held that the mere threat that individuals who engage in protected conduct will be subject to arrest and prosecution suffices to render a statute overbroad. Rather, our overbreadth jurisprudence has consistently focused on whether *the prohibitory terms* of a particular statute extend to protected conduct; that is, we have inquired whether individuals who engage in protected conduct can be *convicted* under a statute, not whether they might be subject to arrest and prosecution. *E. g.*, *Houston* v. *Hill*, 482 U. S. 451, 459 (1987) (a statute "that *make[s] unlawful* a substantial amount of constitutionally protected conduct may be held facially invalid" (emphasis added)); *Grayned* v. *City of Rock-*

*ford*, 408 U. S. 104, 114 (1972) (a statute may be overbroad "if in its reach it *prohibits* constitutionally protected conduct" (emphasis added)); *R. A. V.* v. *St. Paul*, 505 U. S., at 397 (White, J., concurring in judgment) (deeming the ordinance at issue "fatally overbroad because it *criminalizes* . . . expression protected by the First Amendment" (emphasis added)).

Unwilling to embrace the Virginia Supreme Court's novel mode of overbreadth analysis, today's opinion properly focuses on the question of who may be convicted, rather than who may be arrested and prosecuted, under § 18.2–423. Thus, it notes that "[t]he prima facie evidence provision permits a jury *to convict* in every cross-burning case in which defendants exercise their constitutional right not to put on a defense."[1] *Ante*, at 365 (emphasis added). In such cases, the plurality explains, "[t]he provision permits the Commonwealth to arrest, prosecute, *and convict* a person based solely on the fact of cross burning itself." *Ibid.* (emphasis added). And this, according to the plurality, is constitutionally problematic because "a burning cross is not always intended to intimidate," and nonintimidating cross burning cannot be prohibited. *Ibid.* In particular, the opinion notes that cross burning may serve as "a statement of ideology" or "a symbol of group solidarity" at Ku Klux Klan rituals, and may even serve artistic purposes as in the case of the film Mississippi Burning. *Ante*, at 365–366.

The plurality is correct in all of this—and it means that some individuals who engage in protected speech may, be-

[1] The plurality also asserts that "even where a defendant like Black presents a defense, the prima facie evidence provision makes it more likely that the jury will find an intent to intimidate regardless of the particular facts of the case." *Ante*, at 365. There is no basis for this assertion. The Virginia Supreme Court's opinion in *Nance* v. *Commonwealth*, 203 Va. 428, 432, 124 S. E. 2d 900, 903–904 (1962), states, in no uncertain terms, that the presentation of a prima facie case " 'relieves neither the court nor the jury of the duty to determine all of the questions of fact from the weight of *the whole evidence.*' " (Emphasis added.)

cause of the prima-facie-evidence provision, be subject to conviction. Such convictions, assuming they are unconstitutional, could be challenged on a case-by-case basis. The plurality, however, with little in the way of explanation, leaps to the conclusion that the *possibility* of such convictions justifies facial invalidation of the statute.

In deeming § 18.2–423 facially invalid, the plurality presumably means to rely on some species of overbreadth doctrine.[2] But it must be a rare species indeed. We have noted that "[i]n a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 494 (1982). If one looks only to the core provision of § 18.2–423—"[i]t shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross . . ."—it appears *not* to capture any protected conduct; that language is limited in its reach to con-

[2] Overbreadth was, of course, the framework of analysis employed by the Virginia Supreme Court. See 262 Va. 764, 777–778, 553 S. E. 2d 738, 745–746 (2001) (examining the prima-facie-evidence provision in a section labeled "OVERBREADTH ANALYSIS" and holding that the provision "is overbroad"). Likewise, in their submissions to this Court, the parties' analyses of the prima-facie-evidence provision focus on the question of overbreadth. Brief for Petitioner 41–50 (confining its discussion of the prima-facie-evidence provision to a section titled "THE VIRGINIA STATUTE IS NOT OVERBROAD"); Brief for Respondents 39–41 (arguing that "[t]he prima facie evidence provision . . . render[s] [the statute] overbroad"); Reply Brief for Petitioner 13–20 (dividing its discussion of the prima-facie-evidence provision into sections titled "There Is No Real Overbreadth" and "There Is No Substantial Overbreadth"). This reliance on overbreadth doctrine is understandable. This Court has made clear that to succeed in a facial challenge *without* relying on overbreadth doctrine, "the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States* v. *Salerno*, 481 U. S. 739, 745 (1987). As the Court's opinion concedes, some of the speech covered by § 18.2–423 can constitutionally be proscribed, *ante*, at 363.

duct which a State is, under the Court's holding, *ante*, at 363, allowed to prohibit. In order to identify *any* protected conduct that is affected by Virginia's cross-burning law, the plurality is compelled to focus not on the statute's core prohibition, but on the prima-facie-evidence provision, and hence on *the process* through which the prohibited conduct may be found by a jury.[3] And even in that context, the plurality cannot claim that improper convictions will result from the operation of the prima-facie-evidence provision *alone*. As the plurality concedes, the only persons who might impermissibly be convicted by reason of that provision are those who adopt a particular trial strategy, to wit, abstaining from the presentation of a defense.

The plurality is thus left with a strikingly attenuated argument to support the claim that Virginia's cross-burning statute is facially invalid. The class of persons that the plurality contemplates could impermissibly be convicted under § 18.2–423 includes only those individuals who (1) burn a cross in public view, (2) do not intend to intimidate, (3) are nonetheless charged and prosecuted, and (4) refuse to present a defense. *Ante*, at 365 ("The prima facie evidence provision permits a jury to convict in every cross-burning case in which defendants exercise their constitutional right not to put on a defense").

Conceding (quite generously, in my view) that this class of persons exists, it cannot possibly give rise to a viable facial challenge, not even with the aid of our First Amendment

[3] Unquestionably, the process through which elements of a criminal offense are established in a jury trial may raise serious constitutional concerns. Typically, however, such concerns sound in due process, not First Amendment overbreadth. *E. g.*, *County Court of Ulster Cty.* v. *Allen*, 442 U. S. 140, 156–157 (1979); *Barnes* v. *United States*, 412 U. S. 837, 838 (1973); *In re Winship*, 397 U. S. 358, 359 (1970). Respondents in this case have not challenged § 18.2–423 under the Due Process Clause, and neither the plurality nor the Virginia Supreme Court relies on due process in declaring the statute invalid.

overbreadth doctrine. For this Court has emphasized repeatedly that "where a statute regulates expressive conduct, the scope of the statute does not render it unconstitutional unless its overbreadth is not only real, but *substantial* as well, judged in relation to the statute's plainly legitimate sweep." *Osborne* v. *Ohio*, 495 U. S. 103, 112 (1990) (internal quotation marks omitted; emphasis added). See also *Houston* v. *Hill*, 482 U. S., at 458 ("Only a statute that is substantially overbroad may be invalidated on its face"); *Members of City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 800 (1984) ("[T]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge"); *New York* v. *Ferber*, 458 U. S. 747, 771 (1982) ("[A] law should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications . . ."). The notion that the set of cases identified by the plurality in which convictions might improperly be obtained is sufficiently large to render the statute *substantially* overbroad is fanciful. The potential improper convictions of which the plurality complains are more appropriately classified as the sort of "marginal applications" of a statute in light of which "facial invalidation is inappropriate." *Parker* v. *Levy*, 417 U. S. 733, 760 (1974).[4]

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[4] Confronted with the incontrovertible fact that this statute easily passes overbreadth analysis, the plurality is driven to the truly startling assertion that a statute which is not invalid in all of its applications may nevertheless be facially invalidated *even if it is not overbroad.* The *only expression* of that proposition that the plurality can find in our jurisprudence appears in footnote dictum in the 5-to-4 opinion in *Secretary of State of Md.* v. *Joseph H. Munson Co.*, 467 U. S. 947, 965–966, n. 13 (1984). See *id.*, at 975 (REHNQUIST, J., joined by Burger, C. J., and Powell and O'CONNOR, JJ., dissenting). *Stare decisis* cannot explain the newfound affection for this errant doctrine (even if *stare decisis* applied to dictum), because the holding of a *later* opinion (joined by six Justices) flatly repudiated it. See *United States* v. *Salerno*, *supra*, at 745 (REHNQUIST, C. J., joined by

Perhaps more alarming, the plurality concedes, *ante*, at 364, 365, that its understanding of the prima-facie-evidence provision is premised on the jury instructions given in respondent Black's case. This would all be well and good were it not for the fact that the plurality *facially invalidates* § 18.2–423. *Ante*, at 367 ("[T]he prima facie evidence provision, as interpreted through the jury instruction and as applied in Barry Black's case, is unconstitutional on its face"). I am aware of no case—and the plurality cites none—in which we have facially invalidated an *ambiguous* statute on the basis of a constitutionally troubling jury instruction.[5] And it is alto-

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White, Blackmun, Powell, O'CONNOR, and SCALIA, JJ.) (to succeed in a facial challenge without relying on overbreadth doctrine, "the challenger must establish that no set of circumstances exists under which the Act would be valid").

Even if I were willing, as the plurality apparently is, to ignore our repudiation of the *Munson* dictum, that case provides no foundation whatever for facially invalidating a statute under the conditions presented here. Our willingness facially to invalidate the statute in *Munson* without reliance on First Amendment overbreadth was premised on our conclusion that the challenged provision was invalid *in all of its applications.* We explained that "there is no core of easily identifiable and constitutionally proscribable conduct that the statute prohibits." *Munson*, 467 U. S., at 965–966. And we stated that "[t]he flaw in the statute is not simply that it includes within its sweep some impermissible applications, but that in all its applications it operates on a fundamentally mistaken premise that high solicitation costs are an accurate measure of fraud." *Id.*, at 966. Unless the Court is prepared to abandon a contention that it takes great pains to establish—that "the history of cross burning in this country shows that cross burning is often intimidating, intended to create a pervasive fear in victims that they are a target of violence," *ante*, at 360—it is difficult to see how *Munson* has any bearing on the constitutionality of the prima-facie-evidence provision.

[5] The plurality's reliance on *Terminiello* v. *Chicago*, 337 U. S. 1 (1949), is mistaken. In that case the Court deemed only the jury instruction, rather than the ordinance under review, to be constitutionally infirm. To be sure, it held that such a jury instruction could *never* support a constitutionally valid conviction, but that is quite different from holding the *ordinance* to be facially invalid. Insofar as the ordinance was concerned, *Terminiello* made repeated references to the as-applied nature of the

gether unsurprising that there is no precedent for such a holding. For where state law is ambiguous, treating jury instructions as binding interpretations would cede an enormous measure of power over state law to trial judges. A single judge's idiosyncratic reading of a state statute could trigger its invalidation. In this case, the troubling instruction—"The burning of a cross, by itself, is sufficient evidence from which you may infer the required intent," App. 196—was taken verbatim from Virginia's Model Jury Instructions. But these Model Instructions have been neither promulgated by the legislature nor formally adopted by the Virginia Supreme Court. And it is hornbook law, in Virginia as elsewhere, that "[p]roffered instructions which do not correctly state the law . . . are erroneous and should be refused." 10A Michie's Jurisprudence of Virginia and West Virginia, Instructions § 15, p. 35 (Supp. 2000).

The plurality's willingness to treat this jury instruction as binding (and to strike down § 18.2–423 on that basis) would be shocking enough had the Virginia Supreme Court offered no guidance as to the proper construction of the prima-facie-evidence provision. For ordinarily we would decline to pass upon the constitutionality of an ambiguous state statute until that State's highest court had provided a binding construc-

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challenge. *Id.*, at 3 (noting that the defendant "maintained at all times that the ordinance *as applied to his conduct* violated his right of free speech . . ." (emphasis added)); *id.*, at 5 (noting that *"[a]s construed and applied* [the provision] at least contains parts that are unconstitutional" (emphasis added)); *id.*, at 6 ("The pinch of the statute is in *its application*" (emphasis added)); *ibid.* ("The record makes clear that petitioner at all times challenged the constitutionality of the ordinance *as construed and applied to him*" (emphasis added)). See also Isserles, Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement, 48 Am. U. L. Rev. 359, 433, n. 333 (1998) (characterizing *Terminiello* as "adopting a court's jury instruction as an authoritative narrowing construction of a breach of the peace ordinance but ultimately confining its decision to overturning the defendant's conviction rather than invalidating the statute on its face").

tion. *E. g., Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 78 (1997). If there is any exception to that rule, it is the case where one of two possible interpretations of the state statute would clearly render it unconstitutional, and the other would not. In that situation, applying the maxim "*ut res magis valeat quam pereat*" we would do *precisely the opposite* of what the plurality does here—that is, we would adopt the alternative reading that renders the statute constitutional rather than unconstitutional. The plurality's analysis is all the more remarkable given the dissonance between the interpretation of § 18.2–423 implicit in the jury instruction and the one suggested by the Virginia Supreme Court. That court's opinion did not state that, once proof of public cross burning is presented, a jury is permitted to infer an intent to intimidate *solely* on this basis and regardless of whether a defendant has offered evidence to rebut any such inference. To the contrary, in keeping with the black-letter understanding of "prima facie evidence," the Virginia Supreme Court explained that such evidence suffices only to "insulate the Commonwealth from a motion to strike the evidence at the end of its case-in-chief." 262 Va., at 778, 553 S. E. 2d, at 746. The court did not so much as hint that a jury is permitted, under § 18.2–423, to ignore rebuttal evidence and infer an intent to intimidate strictly on the basis of the prosecution's prima facie case. And unless and until the Supreme Court of Virginia tells us that the prima-facie-evidence provision permits a jury to infer intent under such conditions, this Court is entirely unjustified in facially invalidating § 18.2–423 on this basis.

As its concluding performance, in an apparent effort to paper over its unprecedented decision facially to invalidate a statute in light of an errant jury instruction, the plurality states:

> "We recognize that the Supreme Court of Virginia has not authoritatively interpreted the meaning of the prima facie evidence provision. . . . We also recognize the

> theoretical possibility that the court, on remand, could interpret the provision in a manner different from that so far set forth in order to avoid the constitutional objections we have described. We leave open that possibility." *Ante,* at 367.

Now this is truly baffling. Having declared, in the immediately preceding sentence, that § 18.2–423 is "unconstitutional *on its face,*" *ibid.* (emphasis added), the plurality holds out the possibility that the Virginia Supreme Court will offer some saving construction of the statute. It should go without saying that if a saving construction of § 18.2–423 is possible, then facial invalidation is inappropriate. *E. g., Harrison* v. *NAACP,* 360 U. S. 167, 176 (1959) ("[N]o principle has found more consistent or clear expression than that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them"). So, what appears to have happened is that the plurality has facially invalidated not § 18.2–423, but its own hypothetical interpretation of § 18.2–423, and has then remanded to the Virginia Supreme Court to learn the *actual* interpretation of § 18.2–423. Words cannot express my wonderment at this virtuoso performance.

## III

As the analysis in Part I, *supra,* demonstrates, I believe the prima-facie-evidence provision in Virginia's cross-burning statute is constitutionally unproblematic. Nevertheless, because the Virginia Supreme Court has not yet offered an authoritative construction of § 18.2–423, I concur in the Court's decision to vacate and remand the judgment with respect to respondents Elliott and O'Mara. I also agree that respondent Black's conviction cannot stand. As noted above, the jury in Black's case was instructed that "[t]he burning of a cross, *by itself,* is sufficient evidence from which you may infer the required intent." App. 196 (emphasis

added). Where this instruction has been given, it is impossible to determine whether the jury has rendered its verdict (as it must) in light of the entire body of facts before it—*including* evidence that might rebut the presumption that the cross burning was done with an intent to intimidate—or, instead, has chosen to ignore such rebuttal evidence and focused exclusively on the fact that the defendant burned a cross.[6] Still, I cannot go along with the Court's decision to affirm the judgment with respect to Black. In that judgment, the Virginia Supreme Court, having erroneously concluded that § 18.2–423 is overbroad, not only vacated Black's conviction, but dismissed the indictment against him as well. 262 Va., at 779, 553 S. E. 2d, at 746. Because I believe the constitutional defect in Black's conviction is rooted in a jury instruction and not in the statute itself, I would not dismiss the indictment and would permit the Commonwealth to retry Black if it wishes to do so. It is an interesting question whether the plurality's willingness to let the Virginia Supreme Court resolve the plurality's make-believe facial invalidation of the statute extends as well to the facial invalidation insofar as it supports dismissal of the indictment against Black. Logically, there is no reason why it would not.

JUSTICE SOUTER, with whom JUSTICE KENNEDY and JUSTICE GINSBURG join, concurring in the judgment in part and dissenting in part.

I agree with the majority that the Virginia statute makes a content-based distinction within the category of punishable intimidating or threatening expression, the very type of dis-

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[6] Though the jury may well have embraced the former (constitutionally permissible) understanding of its duties, that possibility is not enough to dissipate the cloud of constitutional doubt. See *Sandstrom* v. *Montana*, 442 U. S. 510, 517 (1979) (refusing to assume that the jury embraced a constitutionally sound understanding of an ambiguous instruction: "[W]e cannot discount the possibility that the jury may have interpreted the instruction [improperly]").

tinction we considered in *R. A. V.* v. *St. Paul*, 505 U. S. 377 (1992). I disagree that any exception should save Virginia's law from unconstitutionality under the holding in *R. A. V.* or any acceptable variation of it.

## I

The ordinance struck down in *R. A. V.*, as it had been construed by the State's highest court, prohibited the use of symbols (including but not limited to a burning cross) as the equivalent of generally proscribable fighting words, but the ordinance applied only when the symbol was provocative "'on the basis of race, color, creed, religion or gender.'" *Id.*, at 380 (quoting St. Paul, Minn., Legis. Code § 292.02 (1990)). Although the Virginia statute in issue here contains no such express "basis of" limitation on prohibited subject matter, the specific prohibition of cross burning with intent to intimidate selects a symbol with particular content from the field of all proscribable expression meant to intimidate. To be sure, that content often includes an essentially intimidating message, that the cross burner will harm the victim, most probably in a physical way, given the historical identification of burning crosses with arson, beating, and lynching. But even when the symbolic act is meant to terrify, a burning cross may carry a further, ideological message of white Protestant supremacy. The ideological message not only accompanies many threatening uses of the symbol, but is also expressed when a burning cross is not used to threaten but merely to symbolize the supremacist ideology and the solidarity of those who espouse it. As the majority points out, the burning cross can broadcast threat and ideology together, ideology alone, or threat alone, as was apparently the choice of respondents Elliott and O'Mara. *Ante,* at 354–357, 363.

The issue is whether the statutory prohibition restricted to this symbol falls within one of the exceptions to *R. A. V.*'s general condemnation of limited content-based proscription

within a broader category of expression proscribable generally. Because of the burning cross's extraordinary force as a method of intimidation, the *R. A. V.* exception most likely to cover the statute is the first of the three mentioned there, which the *R. A. V.* opinion called an exception for content discrimination on a basis that "consists entirely of the very reason the entire class of speech at issue is proscribable." 505 U. S., at 388. This is the exception the majority speaks of here as covering statutes prohibiting "particularly virulent" proscribable expression. *Ante*, at 363.

I do not think that the Virginia statute qualifies for this virulence exception as *R. A. V.* explained it. The statute fits poorly with the illustrative examples given in *R. A. V.*, none of which involves communication generally associated with a particular message, and in fact, the majority's discussion of a special virulence exception here moves that exception toward a more flexible conception than the version in *R. A. V.* I will reserve judgment on that doctrinal development, for even on a pragmatic conception of *R. A. V.* and its exceptions the Virginia statute could not pass muster, the most obvious hurdle being the statute's prima facie evidence provision. That provision is essential to understanding why the statute's tendency to suppress a message disqualifies it from any rescue by exception from *R. A. V.*'s general rule.

## II

*R. A. V.* defines the special virulence exception to the rule barring content-based subclasses of categorically proscribable expression this way: prohibition by subcategory is nonetheless constitutional if it is made "entirely" on the "basis" of "the very reason" that "the entire class of speech at issue is proscribable" at all. 505 U. S., at 388. The Court explained that when the subcategory is confined to the most obviously proscribable instances, "no significant danger of idea or viewpoint discrimination exists," *ibid.*, and the expla-

nation was rounded out with some illustrative examples. None of them, however, resembles the case before us.[1]

The first example of permissible distinction is for a prohibition of obscenity unusually offensive "in its prurience," *ibid.* (emphasis deleted), with citation to a case in which the Seventh Circuit discussed the difference between obscene depictions of actual people and simulations. As that court noted, distinguishing obscene publications on this basis does not suggest discrimination on the basis of the message conveyed. *Kucharek* v. *Hanaway*, 902 F. 2d 513, 517–518 (1990). The opposite is true, however, when a general prohibition of intimidation is rejected in favor of a distinct proscription of intimidation by cross burning. The cross may have been selected because of its special power to threaten, but it may also have been singled out because of disapproval of its message of white supremacy, either because a legislature thought white supremacy was a pernicious doctrine or because it found that dramatic, public espousal of it was a civic embarrassment. Thus, there is no kinship between the cross-burning statute and the core prurience example.

Nor does this case present any analogy to the statute prohibiting threats against the President, the second of *R. A. V.*'s examples of the virulence exception and the one the majority relies upon. *Ante*, at 362. The content discrimination in that statute relates to the addressee of the threat and reflects the special risks and costs associated with threatening the President. Again, however, threats against the President are not generally identified by reference to the content of any message that may accompany the threat, let alone any viewpoint, and there is no obvious correlation in fact between victim and message. Millions of statements are made about the President every day on every subject

[1] Although three examples are given, the third may be skipped here. It covers misleading advertising in a particular industry in which the risk of fraud is thought to be great, and thus deals with commercial speech with its separate doctrine and standards. *R. A. V.*, 505 U. S., at 388–389.

and from every standpoint; threats of violence are not an integral feature of any one subject or viewpoint as distinct from others. Differential treatment of threats against the President, then, selects nothing but special risks, not special messages. A content-based proscription of cross burning, on the other hand, may be a subtle effort to ban not only the intensity of the intimidation cross burning causes when done to threaten, but also the particular message of white supremacy that is broadcast even by nonthreatening cross burning.

I thus read *R. A. V.*'s examples of the particular virulence exception as covering prohibitions that are not clearly associated with a particular viewpoint, and that are consequently different from the Virginia statute. On that understanding of things, I necessarily read the majority opinion as treating *R. A. V.*'s virulence exception in a more flexible, pragmatic manner than the original illustrations would suggest. *Ante*, at 363. Actually, another way of looking at today's decision would see it as a slight modification of *R. A. V.*'s third exception, which allows content-based discrimination within a proscribable category when its "nature" is such "that there is no realistic possibility that official suppression of ideas is afoot." *R. A. V.*, *supra*, at 390. The majority's approach could be taken as recognizing an exception to *R. A. V.* when circumstances show that the statute's ostensibly valid reason for punishing particularly serious proscribable expression probably is not a ruse for message suppression, even though the statute may have a greater (but not exclusive) impact on adherents of one ideology than on others, *ante*, at 362–363.

## III

My concern here, in any event, is not with the merit of a pragmatic doctrinal move. For whether or not the Court should conceive of exceptions to *R. A. V.*'s general rule in a more practical way, no content-based statute should survive even under a pragmatic recasting of *R. A. V.* without a high probability that no "official suppression of ideas is afoot,"

505 U. S., at 390. I believe the prima facie evidence provision stands in the way of any finding of such a high probability here.

Virginia's statute provides that burning a cross on the property of another, a highway, or other public place is "prima facie evidence of an intent to intimidate a person or group of persons." Va. Code Ann. § 18.2–423 (1996). While that language was added by amendment to the earlier portion of the statute criminalizing cross burning with intent to intimidate, *ante*, at 363 (plurality opinion), it was a part of the prohibitory statute at the time these respondents burned crosses, and the whole statute at the time of respondents' conduct is what counts for purposes of the First Amendment.

As I see the likely significance of the evidence provision, its primary effect is to skew jury deliberations toward conviction in cases where the evidence of intent to intimidate is relatively weak and arguably consistent with a solely ideological reason for burning. To understand how the provision may work, recall that the symbolic act of burning a cross, without more, is consistent with both intent to intimidate and intent to make an ideological statement free of any aim to threaten. *Ante*, at 354–357. One can tell the intimidating instance from the wholly ideological one only by reference to some further circumstance. In the real world, of course, and in real-world prosecutions, there will always be further circumstances, and the factfinder will always learn something more than the isolated fact of cross burning. Sometimes those circumstances will show an intent to intimidate, but sometimes they will be at least equivocal, as in cases where a white supremacist group burns a cross at an initiation ceremony or political rally visible to the public. In such a case, if the factfinder is aware of the prima facie evidence provision, as the jury was in respondent Black's case, *ante*, at 349–350, the provision will have the practical effect of tilting the jury's thinking in favor of the prosecution. What is significant is not that the provision

permits a factfinder's conclusion that the defendant acted with proscribable and punishable intent without any further indication, because some such indication will almost always be presented. What is significant is that the provision will encourage a factfinder to err on the side of a finding of intent to intimidate when the evidence of circumstances fails to point with any clarity either to the criminal intent or to the permissible one. The effect of such a distortion is difficult to remedy, since any guilty verdict will survive sufficiency review unless the defendant can show that, "viewing the evidence in the light most favorable to the prosecution, [no] rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson* v. *Virginia*, 443 U. S. 307, 319 (1979). The provision will thus tend to draw nonthreatening ideological expression within the ambit of the prohibition of intimidating expression, as JUSTICE O'CONNOR notes. *Ante*, at 365–366 (plurality opinion).

To the extent the prima facie evidence provision skews prosecutions, then, it skews the statute toward suppressing ideas. Thus, the appropriate way to consider the statute's prima facie evidence term, in my view, is not as if it were an overbroad statutory definition amenable to severance or a narrowing construction. The question here is not the permissible scope of an arguably overbroad statute, but the claim of a clearly content-based statute to an exception from the general prohibition of content-based proscriptions, an exception that is not warranted if the statute's terms show that suppression of ideas may be afoot. Accordingly, the way to look at the prima facie evidence provision is to consider it for any indication of what is afoot. And if we look at the provision for this purpose, it has a very obvious significance as a mechanism for bringing within the statute's prohibition some expression that is doubtfully threatening though certainly distasteful.

It is difficult to conceive of an intimidation case that could be easier to prove than one with cross burning, assum-

ing any circumstances suggesting intimidation are present. The provision, apparently so unnecessary to legitimate prosecution of intimidation, is therefore quite enough to raise the question whether Virginia's content-based statute seeks more than mere protection against a virulent form of intimidation. It consequently bars any conclusion that an exception to the general rule of *R. A. V.* is warranted on the ground "that there is no realistic [or little realistic] possibility that official suppression of ideas is afoot," 505 U. S., at 390.[2] Since no *R. A. V.* exception can save the statute as content based, it can only survive if narrowly tailored to serve a compelling state interest, *id.*, at 395–396, a stringent test the statute cannot pass; a content-neutral statute banning intimidation would achieve the same object without singling out particular content.

## IV

I conclude that the statute under which all three of the respondents were prosecuted violates the First Amendment, since the statute's content-based distinction was invalid at the time of the charged activities, regardless of whether the prima facie evidence provision was given any effect in any respondent's individual case. In my view, severance of the prima facie evidence provision now could not eliminate the unconstitutionality of the whole statute at the time of the respondents' conduct. I would therefore affirm the judgment of the Supreme Court of Virginia vacating the respondents' convictions and dismissing the indictments. Accordingly, I concur in the Court's judgment as to respondent Black and dissent as to respondents Elliott and O'Mara.

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[2] The same conclusion also goes for the second *R. A. V.* exception relating to "'secondary effects.'" 505 U. S., at 389 (citing *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41, 48 (1986)). Our "secondary effects" jurisprudence presupposes that the regulation at issue is "unrelated to the suppression of free expression." *Ibid.*

JUSTICE THOMAS, dissenting.

In every culture, certain things acquire meaning well beyond what outsiders can comprehend. That goes for both the sacred, see *Texas* v. *Johnson*, 491 U. S. 397, 422–429 (1989) (REHNQUIST, C. J., dissenting) (describing the unique position of the American flag in our Nation's 200 years of history), and the profane. I believe that cross burning is the paradigmatic example of the latter.

## I

Although I agree with the majority's conclusion that it is constitutionally permissible to "ban . . . cross burning carried out with the intent to intimidate," *ante*, at 363, I believe that the majority errs in imputing an expressive component to the activity in question, see *ante*, at 362 (relying on one of the exceptions to the First Amendment's prohibition on content-based discrimination outlined in *R. A. V.* v. *St. Paul*, 505 U. S. 377 (1992)). In my view, whatever expressive value cross burning has, the legislature simply wrote it out by banning only intimidating conduct undertaken by a particular means. A conclusion that the statute prohibiting cross burning with intent to intimidate sweeps beyond a prohibition on certain conduct into the zone of expression overlooks not only the words of the statute but also reality.

### A

"In holding [the ban on cross burning with intent to intimidate] unconstitutional, the Court ignores Justice Holmes' familiar aphorism that 'a page of history is worth a volume of logic.'" *Texas* v. *Johnson*, *supra*, at 421 (REHNQUIST, C. J., dissenting) (quoting *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349 (1921)).

> "The world's oldest, most persistent terrorist organization is not European or even Middle Eastern in origin. Fifty years before the Irish Republican Army was orga-

> nized, a century before Al Fatah declared its holy war on Israel, the Ku Klux Klan was actively harassing, torturing, and murdering in the United States. Today . . . its members remain fanatically committed to a course of violent opposition to social progress and racial equality in the United States." M. Newton & J. Newton, The Ku Klux Klan: An Encyclopedia vii (1991) (hereinafter Newton & Newton).

To me, the majority's brief history of the Ku Klux Klan only reinforces this common understanding of the Klan as a terrorist organization, which, in its endeavor to intimidate, or even eliminate those it dislikes, uses the most brutal of methods.

Such methods typically include cross burning—"a tool for the intimidation and harassment of racial minorities, Catholics, Jews, Communists, and any other groups hated by the Klan." *Capitol Square Review and Advisory Bd.* v. *Pinette*, 515 U. S. 753, 770 (1995) (THOMAS, J., concurring). For those not easily frightened, cross burning has been followed by more extreme measures, such as beatings and murder. J. Williams, Eyes on the Prize: America's Civil Rights Years, 1954–1965, p. 39 (1987). As the Government points out, the association between acts of intimidating cross burning and violence is well documented in recent American history. Brief for United States as *Amicus Curiae* 3–4, and n. 2.[1]

[1] *United States* v. *Guest*, 383 U. S. 745, 747–748, n. 1 (1966) (quoting indictment charging conspiracy under 18 U. S. C. § 241 (1964 ed.) to interfere with federally secured rights by, *inter alia*, "burning crosses at night in public view," "shooting Negroes," "beating Negroes," "killing Negroes," "damaging and destroying property of Negroes," and "pursuing Negroes in automobiles and threatening them with guns"); *United States* v. *Pospisil*, 186 F. 3d 1023, 1027 (CA8 1999) (defendants burned a cross in victims' yard, slashed their tires, and fired guns), cert. denied, 529 U. S. 1089 (2000); *United States* v. *Stewart*, 65 F. 3d 918, 922 (CA11 1995) (cross burning precipitated an exchange of gunfire between victim and perpetrators), cert. denied *sub nom. Daniel* v. *United States*, 516 U. S. 1134 (1996); *United States* v. *McDermott*, 29 F. 3d 404, 405 (CA8 1994) (defendants

Indeed, the connection between cross burning and violence is well ingrained, and lower courts have so recognized:

> "After the mother saw the burning cross, she was crying on her knees in the living room. [She] felt feelings of frustration and intimidation and feared for her husband's life. She testified what the burning cross symbolized to her as a black American: 'Nothing good. Murder, hanging, rape, lynching. Just anything bad

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sought to discourage blacks from using public park by burning a cross in the park, as well as by "waving baseball bats, axe handles, and knives; throwing rocks and bottles; veering cars towards black persons; and physically chasing black persons out of the park"); *Cox* v. *State*, 585 So. 2d 182, 202 (Ala. Crim. App. 1991) (defendant participated in evening of cross burning and murder), cert. denied, 503 U. S. 987 (1992); R. Caro, The Years of Lyndon Johnson: Master of the Senate 847 (2002) (referring to a wave of "southern bombings, beatings, sniper fire, and cross-burnings" in late 1956 in response to efforts to desegregate schools, buses, and parks); Newton & Newton 21 (observing that "Jewish merchants were subjected to boycotts, threats, cross burnings, and sometimes acts of violence" by the Klan and its sympathizers); *id.*, at 361–362 (describing cross burning and beatings directed at a black family that refused demands to sell the home); *id.*, at 382 (describing incident of cross burning and brick throwing at home of Jewish officeholder); *id.*, at 583 (describing campaign of cross burning and property damage directed at Vietnamese immigrant fishermen); W. Wade, The Fiery Cross: The Ku Klux Klan in America 262–263 (1987) (describing incidents of cross burning, beatings, kidnaping, and other "terrorism" directed against union organizers in the South); *id.*, at 376 (cross burnings associated with shooting into cars); *id.*, at 377 (cross burnings associated with assaults on blacks); 1 R. Kluger, Simple Justice 378 (1975) (describing cross burning at, and subsequent shooting into, home of federal judge who issued desegregation decisions); Rubinowitz & Perry, Crimes Without Punishment: White Neighbors' Resistance to Black Entry, 92 J. Crim. L. & C. 335, 342, 354–355, 388, 408–410, 419, 420, 421, 423 (Fall 2001–Winter 2002) (noting that an "escalating campaign to eject a [minority] family" from a white neighborhood could begin with "cross burnings, window breaking, or threatening telephone calls," and culminate with bombings; describing other incidents of cross burning accompanied by violence); Cross Burned at Manakin, Third in Area, Richmond Times-Dispatch, Feb. 26, 1951, p. 4, App. 318 (describing 1951 Virginia cross burning accompanied by gunfire).

> that you can name. It is the worst thing that could happen to a person.' . . . Mr. Heisser told the probation officer that at the time of the occurrence, if the family did not leave, he believed someone would return to commit murder. . . . *Seven months after the incident, the family still lived in fear. . . . This is a reaction reasonably to be anticipated from this criminal conduct.*" *United States* v. *Skillman*, 922 F. 2d 1370, 1378 (CA9 1991) (emphasis added).

But the perception that a burning cross is a threat and a precursor of worse things to come is not limited to blacks. Because the modern Klan expanded the list of its enemies beyond blacks and "radical[s]" to include Catholics, Jews, most immigrants, and labor unions, Newton & Newton ix, a burning cross is now widely viewed as a signal of impending terror and lawlessness. I wholeheartedly agree with the observation made by the Commonwealth of Virginia:

> "A white, conservative, middle-class Protestant, waking up at night to find a burning cross outside his home, will reasonably understand that someone is threatening him. His reaction is likely to be very different than if he were to find, say, a burning circle or square. In the latter case, he may call the fire department. In the former, he will probably call the police." Brief for Petitioner 26.

In our culture, cross burning has almost invariably meant lawlessness and understandably instills in its victims well-grounded fear of physical violence.

## B

Virginia's experience has been no exception. In Virginia, though facing widespread opposition in the 1920's, the Klan developed localized strength in the southeastern part of the Commonwealth, where there were reports of scattered raids and floggings. Newton & Newton 585. Although the Klan was disbanded at the national level in 1944, *ibid.*, a series of

cross burnings in Virginia took place between 1949 and 1952. See 262 Va. 764, 771, n. 2, 553 S. E. 2d 738, 742, n. 2 (2001) (collecting newspaper accounts of cross burnings in Virginia during that time period); see also Cross Fired Near Suffolk Stirs Probe, Burning Second in Past Week, Richmond Times-Dispatch, Jan. 23, 1949, section 2, p. 1, App. 313, 314–315 (The second reported cross burning within a week in 1949 "brought to eight the number which have occurred in Virginia during the past year. Six of the incidents have occurred in Nansemond County. Four crosses were burned near Suffolk last Spring, and about 150 persons took part in the December 11 cross burning near Whaleyville. No arrests have been made in connection with any of the incidents").

Most of the crosses were burned on the lawns of black families, who either were business owners or lived in predominantly white neighborhoods. See Police Aid Requested by Teacher, Cross is Burned in Negro's Yard, Richmond News Leader, Jan. 21, 1949, p. 19, App. 312; Cross Fired Near Suffolk Stirs Probe, Burning Second in Past Week, *supra*, at 313; Cross is Burned at Reedville Home, Richmond News Leader, Apr. 14, 1951, p. 1, App. 321. At least one of the cross burnings was accompanied by a shooting. Cross Burned at Manakin, Third in Area, *supra* n. 1, at 318. The crosses burned near residences were about five to six feet tall, while a "huge cross reminiscent of the Ku Klux Klan days" that burned "atop a hill" as part of the initiation ceremony of the secret organization of the Knights of Kavaliers was 12 feet tall. Huge Cross is Burned on Hill Just South of Covington, Richmond Times-Dispatch, Apr. 14, 1950, p. 6, App. 316. These incidents were, in the words of the time, "*terroristic [sic]*" and "un-American act[s], designed to *intimidate* Negroes from seeking their rights as citizens." Cross Fired Near Suffolk Stirs Probe, Burning Second in Past Week, *supra*, at 315 (emphasis added).

In February 1952, in light of this series of cross burnings and attendant reports that the Klan, "long considered dead in Virginia, is being revitalized in Richmond," Governor Battle announced that "Virginia 'might well consider passing legislation' to restrict the activities of the Ku Klux Klan." "State Might Well Consider" Restrictions on Ku Klux Klan, Governor Battle Comments, Richmond Times-Dispatch, Feb. 6, 1952, p. 7, App. 321. As newspapers reported at the time, the bill was "to ban the burning of crosses and other similar evidences of *terrorism*." Name Rider Approved by House, Richmond News Leader, Feb. 23, 1952, p. 1, App. 325 (emphasis added). The bill was presented to the House of Delegates by a former FBI agent and future two-term Governor, Delegate Mills E. Godwin, Jr. "Godwin said law and order in the State were impossible if organized groups could *create fear by intimidation*." Bill to Curb KKK Passed By the House, Action is Taken Without Debate, Richmond Times-Dispatch, Mar. 8, 1952, p. 5, App. 325 (emphasis added).

That in the early 1950's the people of Virginia viewed cross burning as creating an intolerable atmosphere of terror is not surprising: Although the cross took on some religious significance in the 1920's when the Klan became connected with certain southern white clergy, by the postwar period it had reverted to its original function "as an instrument of intimidation." W. Wade, The Fiery Cross: The Ku Klux Klan in America 185, 279 (1987).

Strengthening Delegate Godwin's explanation, as well as my conclusion, that the legislature sought to criminalize terrorizing *conduct* is the fact that at the time the statute was enacted, racial segregation was not only the prevailing practice, but also the law in Virginia.[2] And, just two years

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[2] See, *e. g.*, Va. Code Ann. § 18–327 (1950) (repealed 1960) (required separation of "white" and "colored" at any place of entertainment or other public assemblage; violation was misdemeanor); Va. Code Ann. § 20–54 (1960) (repealed 1968) (prohibited racial intermarriage); Va. Code Ann. § 22–221 (1969) (repealed 1972) ("White and colored persons shall not be

after the enactment of this statute, Virginia's General Assembly embarked on a campaign of "massive resistance" in response to *Brown* v. *Board of Education*, 347 U. S. 483 (1954). See generally *Griffin* v. *School Bd. of Prince Edward Cty.*, 377 U. S. 218, 221 (1964); *Harrison* v. *Day*, 200 Va. 439, 448–454, 106 S. E. 2d 636, 644–648 (1959) (describing massive resistance as legislatively mandated attempt to close public schools rather than desegregate).

It strains credulity to suggest that a state legislature that adopted a litany of segregationist laws self-contradictorily intended to squelch the segregationist message. Even for segregationists, violent and terroristic conduct, the Siamese twin of cross burning, was intolerable. The ban on cross burning with intent to intimidate demonstrates that even segregationists understood the difference between intimidating and terroristic conduct and racist expression. It is simply beyond belief that, in passing the statute now under review, the Virginia Legislature was concerned with anything but penalizing conduct it must have viewed as particularly vicious.

Accordingly, this statute prohibits only conduct, not expression. And, just as one cannot burn down someone's house to make a political point and then seek refuge in the First Amendment, those who hate cannot terrorize and intimidate to make their point. In light of my conclusion that

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taught in the same school"); Va. Code Ann. § 24–120 (1969) (repealed 1970) (required separate listings for "white and colored persons" who failed to pay poll tax); Va. Code Ann. § 38–281 (1950) (repealed 1952) (prohibited fraternal associations from having "both white and colored members"); Va. Code Ann. § 53–42 (1967) (amended to remove "race" 1968) (required racial separation in prison); Va. Code Ann. § 56–114 (1974) (repealed 1975) (authorized State Corporation Commission to require "separate waiting rooms" for "white and colored races"); Va. Code Ann. § 56–326 (1969) (repealed 1970) (required motor carriers to "separate" their "white and colored passengers," violation was misdemeanor); §§ 56–390 and 56–396 (repealed 1970) (same for railroads); § 58–880 (repealed 1970) (required separate personal property tax books for "white[s]" and "colored").

the statute here addresses only conduct, there is no need to analyze it under any of our First Amendment tests.

## II

Even assuming that the statute implicates the First Amendment, in my view, the fact that the statute permits a jury to draw an inference of intent to intimidate from the cross burning itself presents no constitutional problems. Therein lies my primary disagreement with the plurality.

### A

"The threshold inquiry in ascertaining the constitutional analysis applicable to [a jury instruction involving a presumption] is to determine the nature of the presumption it describes." *Francis* v. *Franklin*, 471 U. S. 307, 313–314 (1985) (internal quotation marks omitted). We have categorized the presumptions as either permissive inferences or mandatory presumptions. *Id.*, at 314.

To the extent we do have a construction of this statute by the Virginia Supreme Court, we know that both the majority and the dissent agreed that the presumption was "a statutorily supplied *inference*," 262 Va., at 778, 553 S. E. 2d, at 746 (emphasis added); *id.*, at 795, 553 S. E. 2d, at 755 (Hassell, J., dissenting) ("Code § 18.2–423 creates a statutory *inference*" (emphasis added)). Under Virginia law, the term "inference" has a well-defined meaning and is distinct from the term "presumption." *Martin* v. *Phillips*, 235 Va. 523, 526, 369 S. E. 2d 397, 399 (1988).

> "A presumption is a rule of law that compels the fact finder to draw a certain conclusion or a certain inference from a given set of facts.[1] The primary significance of a presumption is that it operates to shift to the opposing party the burden of producing evidence tending to rebut the presumption.[2] No presumption, however, can operate to shift the ultimate burden of persuasion from the party upon whom it was originally cast.

> "[1]In contrast, *an inference*, sometimes loosely referred to as a presumption of fact, *does not compel a specific conclusion. An inference merely applies to the rational potency or probative value of an evidentiary fact to which the fact finder may attach whatever force or weight it deems best.* 9 J. Wigmore, Evidence in Trials at Common Law § 2491(1), at 304 (Chad. rev. 1981).
>
> "[2]*An inference, on the other hand, does not invoke this procedural consequence of shifting the burden of production. Id.*"

*Ibid.* (some citations omitted; emphasis added).

Both the majority and the dissent below classified the clause in question as an "inference," and I see no reason to disagree, particularly in light of the instructions given to the jury in Black's case, requiring it to find guilt beyond a reasonable doubt both as to the fact that "the defendant burned or caused to be burned a cross in a public place," and that "he did so with the intent to intimidate any person or group of persons," 262 Va., at 796, 553 S. E. 2d, at 756 (Hassell, J., dissenting) (quoting jury instructions in Black's case).

Even though under Virginia law the statutory provision at issue here is characterized as an "inference," the Court must still inquire whether the label Virginia attaches corresponds to the categorization our cases have given such clauses. In this respect, it is crucial to observe that what Virginia law calls an "inference" is what our cases have termed a "permissive inference or presumption." *County Court of Ulster Cty.* v. *Allen*, 442 U. S. 140, 157 (1979).[3] Given that this

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[3] As the Court explained in *Allen*, a permissive inference or presumption "allows—but does not require—the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and which places no burden of any kind on the defendant. In that situation the basic fact may constitute prima facie evidence of the elemental fact. . . . Because this permissive presumption leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof, it affects the application of the 'beyond a reasonable doubt' standard only if, under the facts of the case, there is no rational way the trier could make the connection permit-

Court's definitions of a "permissive inference" and a "mandatory presumption" track Virginia's definitions of "inference" and "presumption," the Court should judge the Virginia statute based on the constitutional analysis applicable to "inferences": they raise no constitutional flags unless there is "no rational way the trier could make the connection permitted by the inference." *Ibid.* As explained in Part I, *supra*, *not* making a connection between cross burning and intimidation would be irrational.

But even with respect to statutes containing a mandatory irrebuttable presumption as to intent, the Court has not shown much concern. For instance, there is no scienter requirement for statutory rape. See, *e. g.*, Tenn. Code Ann. § 39–13–506 (1997); Ore. Rev. Stat. Ann. § 163.365 (1989); Mo. Rev. Stat. § 566.032 (2000); Ga. Code Ann. § 16–6–3 (1996). That is, a person can be arrested, prosecuted, and convicted for having sex with a minor, without the government ever producing any evidence, let alone proving beyond a reasonable doubt, that a minor did not consent. In fact, "[f]or purposes of the child molesting statute . . . consent is irrelevant. The legislature has determined in such cases that children under the age of sixteen (16) cannot, as a matter of law, consent to have sexual acts performed upon them, or consent to engage in a sexual act with someone over the age of sixteen (16)." *Warrick* v. *State*, 538 N. E. 2d 952, 954 (Ind. App. 1989) (citing Ind. Code § 35–42–4–3 (1988)). The legislature finds the behavior so reprehensible that the intent is satisfied by the mere act committed by a perpetrator. Considering

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ted by the inference." 442 U. S., at 157 (citations omitted). By contrast, "[a] mandatory presumption . . . may affect not only the strength of the 'no reasonable doubt' burden but also the placement of that burden; it tells the trier that he or they *must* find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts." *Ibid.*

the horrific effect cross burning has on its victims, it is also reasonable to presume intent to intimidate from the act itself.

Statutes prohibiting possession of drugs with intent to distribute operate much the same way as statutory rape laws. Under these statutes, the intent to distribute is effectively satisfied by possession of some threshold amount of drugs. See, *e. g.*, Del. Code Ann., Tit. 16, § 4753A (1987); Mass. Gen. Laws, ch. 94C, § 32E (West 1997); S. C. Code Ann. § 44–53–370 (West 2000). As with statutory rape, the presumption of intent in such statutes is irrebuttable—not only can a person be arrested for the crime of possession with intent to distribute (or "trafficking") without any evidence of intent beyond quantity of drugs, but such person cannot even mount a defense to the element of intent. However, as with statutory rape statutes, our cases do not reveal any controversy with respect to the presumption of intent in these drug statutes.

Because the prima facie clause here is an inference, not an irrebuttable presumption, there is all the more basis under our due process precedents to sustain this statute.

## B

The plurality, however, is troubled by the presumption because this is a First Amendment case. The plurality laments the fate of an innocent cross burner who burns a cross, but does so without an intent to intimidate. The plurality fears the chill on expression because, according to the plurality, the inference permits "the Commonwealth to arrest, prosecute, and convict a person based solely on the fact of cross burning itself." *Ante*, at 365. First, it is, at the very least, unclear that the inference comes into play during arrest and initiation of a prosecution, that is, prior to the instructions stage of an actual trial. Second, as I explained above, the inference is rebuttable and, as the jury instructions given in this case demonstrate, Virginia law still re-

quires the jury to find the existence of each element, including intent to intimidate, beyond a reasonable doubt.

Moreover, even in the First Amendment context, the Court has upheld such regulations where conduct that initially appears culpable ultimately results in dismissed charges. A regulation of pornography is one such example. While possession of child pornography is illegal, *New York* v. *Ferber*, 458 U. S. 747, 764 (1982), possession of adult pornography, as long as it is not obscene, is allowed, *Miller* v. *California*, 413 U. S. 15 (1973). As a result, those pornographers trafficking in images of adults who look like minors may be not only deterred but also arrested and prosecuted for possessing what a jury might find to be legal materials. This "chilling" effect has not, however, been a cause for grave concern with respect to overbreadth of such statutes among the Members of this Court.

That the First Amendment gives way to other interests is not a remarkable proposition. What is remarkable is that, under the plurality's analysis, the determination whether an interest is sufficiently compelling depends not on the harm a regulation in question seeks to prevent, but on the area of society at which it aims. For instance, in *Hill* v. *Colorado*, 530 U. S. 703 (2000), the Court upheld a restriction on protests near abortion clinics, explaining that the State had a legitimate interest, which was sufficiently narrowly tailored, in protecting those seeking services of such establishments from "unwanted advice" and "unwanted communication," *id.*, at 708, 716, 717, 729. In so concluding, the Court placed heavy reliance on the "vulnerable physical and emotional conditions" of patients. *Id.*, at 729. Thus, when it came to the rights of those seeking abortions, the Court deemed restrictions on "unwanted advice," which, notably, can be given only from a distance of at least eight feet from a prospective patient, justified by the countervailing interest in obtaining an abortion. Yet, here, the plurality strikes down the statute because one day an individual might wish to burn a cross,

but might do so without an intent to intimidate anyone. That cross burning subjects its targets, and, sometimes, an unintended audience, see 262 Va., at 782, 553 S. E. 2d, at 748–749 (Hassell, J., dissenting); see also App. 93–97, to extreme emotional distress, and is virtually never viewed merely as "unwanted communication," but rather, as a physical threat, is of no concern to the plurality. Henceforth, under the plurality's view, physical safety will be valued less than the right to be free from unwanted communications.

## III

Because I would uphold the validity of this statute, I respectfully dissent.